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IN THE

Supreme Court Of The United States

October Term, 1992

JAMES L. TAYLOR, *et al.*,

Petitioners

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 26, 1993

QUESTIONS PRESENTED

1. Whether a final judgment entered in a class action bars a subsequent claim by an absentee member of the class for monetary damages, when the absentee class member was given no notice of the class action by the court and as a result had no opportunity to appear, be heard, or otherwise participate in the action?

2. Whether a final judgment entered in a class action bars a subsequent claim by an absentee member of the class for monetary damages, when the absentee class member was not given the right to opt out of or remove himself from the class action?

LIST OF PARTIES

The petitioners are the movants in the district court, James L. Taylor, individually and as the administrator of the estates of James J. Taylor and Laura F. Taylor, deceased; Frances Taylor Spence, Deborah Taylor, Diane Taylor Stafford, Phillip Taylor, Gretta Taylor and Annie J. Elrod, individually and as executrix of the estate of David A. Elrod, deceased.

The respondents are Liberty National Life Insurance Company and Aubrey Carr and Carr Service Enterprises, Inc., respondents in the district court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners James L. Taylor, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on October 14, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 974 F.2d 1279, and is reprinted in the appendix hereto, p. A-1, *infra.*

The opinion of the United States District Court for the Northern District of Alabama is reported at 770 F. Supp. 1499, and is reprinted in the appendix hereto, p. A-3, *infra.*

The opinion of the Supreme Court of Alabama in *Taylor v. Liberty Nat'l Life Ins. Co.* is reported at 462 So. 2d 907, and is reprinted in the appendix hereto, p. A-47, *infra.*

JURISDICTION

Petitioners intervened in *Battle, et al. v. Liberty Nat'l Life Ins. Co., et al.*, CV 70-H-752-S, in the United States District Court for the Northern District of Alabama, and moved the court for relief from the judgment entered in that case on the ground that it violated their rights to due process as guaranteed by the Fifth Amendment to the United States Constitution (p. A-3, *infra*). Relief was denied, and the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the lower court in its judgment entered on October 14, 1992 (p. A-1, *infra*). A Petition for Rehearing and Suggestion for Rehearing En Banc was filed and was denied on January 25, 1993 (p. A-77, *infra*). Petitioner invokes the jurisdiction of this Court to review the judgment of the Court of Appeals for the Eleventh Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V.

STATEMENT OF THE CASE

The petitioners before this Court are the heirs and personal representatives of James J. Taylor, Laura F. Taylor, and David H. Elrod. James J. Taylor and Laura F. Taylor died in 1982 and 1983. They were both insured under burial policies issued by Liberty National Life Insurance Company. Their bodies were taken to an authorized funeral director for burial. See p. A-17, *infra.*

The burial policies insuring the Taylors required Liberty National to furnish a casket plus a complete funeral service (pp. A-5 through 6, *infra*). The Taylors' family selected more expensive caskets than those furnished by Liberty National under the policies for the burial of Mr. and Mrs. Taylor (p. A-17, *infra*). As a result, the funeral director, acting at the behest of Liberty National, refused to furnish the funeral services required by the policies, and offered only a credit for the nominal retail value of the policies, which was much less than the funeral director's regular charge for the funeral services otherwise provided by the policies (p. A-17, *infra*).

The Taylors' heirs and personal representatives filed suit in state court against Liberty National seeking damages for breach of contract. Liberty National answered that the Taylors were absentee members of a plaintiff class of burial policyholders in *Battle v. Liberty Nat'l Life Ins. Co.*, CV 70-H-752-S (N.D. Ala.), and that their actions were precluded by the terms of a final judgment which had been entered in that action. See pp. A-17 through 18, *infra*.

Summary judgment was entered in the state court in favor of Liberty National (p. A-18, *infra*). On appeal, the Supreme Court of Alabama reversed, holding that the failure of the district court to give Mr. and Mrs. Taylor notice of the *Battle* action violated their due process rights and that the damage claims of their heirs and personal representatives were not barred by the *Battle* final judgment (p. A-47, *infra*). *Taylor v. Liberty Nat'l Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984). The Supreme Court of Alabama found that the Taylors' rights under their paid up burial policies were "vested property rights" and that "a more classic taking of property can hardly be imagined" (p. A-57, *infra*). 462 So. 2d at 913. As stated by the court,

> To dramatize this point, we observe the obvious: the insurer, as the named defendant in the *Battle* action, obtained affirmative relief (amounting to millions of dollars) at the expense of the policyholders — relief that would have been impossible in a direct action by the insurer against the insureds for refor-

> reformation of the insurance policies. In other words (and no one contends otherwise), settled principles of contract law would dictate summary judgment on behalf of the insureds in any action on the part of the insurer to alter the terms of these burial policies in the manner effected by the federal class action.

(p. A-58, *infra*), 462 So. 2d at 913.

Liberty National then moved in the district court to enjoin the state court suit by the Taylors' heirs and personal representatives. An injunction was granted by the district court, which was affirmed on appeal. *Battle v. Liberty Nat'l Life Ins. Co.*, 660 F. Supp. 1449 (N.D. Ala. 1987), *aff'd*, 877 F.2d 877 (11th Cir. 1989). See pp. A-19 through 21, *infra*.

The Taylors' heirs and personal representatives and Annie J. Elrod[1] then sought relief from the *Battle* final judgment under Fed. R. Civ. P. 60(b)(4). See pp. A-21 through 23, *infra*. Their motion was denied by the district court (p. A-3, *infra*). *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991). The district court's decision was affirmed without opinion by the Court of Appeals for the Eleventh Circuit (p. A-1, *infra*). *Battle v. Liberty Nat'l Life Ins. Co.*, 974 F.2d 1279 (11th Cir. 1992).

The Final Judgment in Battle

In 1972, burial policyholders filed a class action against Liberty National in federal district court. The jurisdiction of the district court was invoked under 15 U.S.C. §§ 1 and 2, the Sherman Act, and under 15 U.S.C. § 14, the Clayton Act. In addition, the policyholders alleged claims for fraud under Alabama law. The policyholders sought $60 million in damages for the anti-trust violations and another $60 million in

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[1] Mrs. Elrod's state court suit for damages for breach of her husband's burial policy had also been enjoined by the district court. Mrs. Elrod had purchased a more expensive casket for the burial of Mr. Elrod. Mrs. Elrod and a number of the Taylor heirs also sought to assert their direct rights as Liberty National burial policyholders.

compensatory and punitive damages for fraud. The policyholders also sought equitable relief in the form of restitution of premiums, reformation of the policies, and certain disclosures by Liberty National. *Campbell et al., v. Liberty Nat'l Life Ins. Co., et al.*, CV 72-H-569-S (N.D. Ala.). See pp. A-10 through 11, *infra*.

In 1975, Liberty National filed a "Motion to Determine Propriety of Class Action under Rule 23(c)(2)" in *Campbell*. In its motion, Liberty National opposed certification of a plaintiff class, but argued in the alternative that if a class was certified, the named plaintiffs and their counsel were required by Rule 23 to provide notice of the action by first class mail to all members of the policyholder class.[2] Liberty National admitted through counsel that it could, with reasonable effort, compile a list of the names and addresses of all burial policyholders.[3] See pp. A-11 through 12, *infra*.

No class was certified as a result of that motion (p. A-11 note 21, *infra*). In 1977, however, all parties entered into an

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[2] In its motion, Liberty National averred as follows: "Notice to the class and an opportunity to be heard are fundamental requisites of the constitutional guarantee of procedural due process and publication of notice does not satisfy such due process requirements where the names and addresses of the class are known. The names and addresses of the class [policyholders] may be identified through reasonable effort. For these class members, individual notice is clearly the best notice practicable within the meaning of Rule 23(c)(2). Individual notice to identifiable members of the class is not a discretionary consideration to be waived, but is an unambiguous requirement of Rule 23." (R.II-87)

[3] At a hearing on Liberty National's motion, counsel for Liberty National stated as follows: "Now as to the character of the notice to be given. I think that we might well say that the Supreme Court said [in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974)] that Rule 23 expressly requires the best practicable notice and intimated, at least, that the due process clause of the Constitution of the United States also requires the best practicable notice. The best practicable notice is notice by mail sent to the name and address of all members of the class whose names and addresses can be obtained through reasonable effort. . . .

I might say that defendants would be prepared to present evidence or to file an affidavit, which we have with us today, to the effect that the names and addresses of the members of this class [policyholders] may be obtained through reasonable effort." (R.II-96, 97)

agreement to settle *Campbell* and two other class actions which had been filed against Liberty National by funeral directors. In accordance with the settlement agreement, the district court consolidated the three actions under the style of *Battle* and created two temporary settlement classes, one consisting of the funeral directors and the other consisting of burial policyholders. See p. A-12, *infra*.

Among other things, the settlement agreement reformed Liberty National's obligations under its burial policies. The burial policies provided a complete funeral service plus a casket. However, in the majority of all funerals, the policyholders' families selected a more expensive casket for the burial, resulting in an oversale (p. A-37 through 38, *infra*). Under the settlement agreement, an oversale effectively voided the policy, and Liberty National was not obligated to provide a complete funeral service (p. A-13, 57, *infra*). Rather, the funeral director was authorized to charge its regular charge for the complete funeral service, allowing only a credit for the nominal retail value of the burial policy, which was much less than the regular funeral service charge (p. A-13, 57, *infra*). The effect of the reformation of the burial policies was to dramatically decrease Liberty National's obligations to its burial policyholders. The Supreme Court of Alabama in *Taylor* found that Liberty National had obtained affirmative relief from its burial policyholders amounting to millions of dollars (p. A-58, *infra*). 462 So. 2d at 913.

The district court determined that the policyholder class included more than one million members and met the requirements of Rule 23(b)(2). The district court then determined that the best notice practicable for the class was written notice to be delivered by agents of Liberty National in the course of their weekly visits to collect policy premiums on policies which were not yet paid up. This notice was to be delivered during a period of four consecutive weeks beginning at least 45 days before the scheduled hearing on the settlement. See p. A-14, *infra*.

The notice scheme devised by the district court failed to provide any notice to burial policyholders whose policies

were paid up and who, for that reason, did not receive visits from agents of Liberty National. The notice given by Liberty National agents was the only notice provided by the district court. The district court failed to provide any additional notice by publication. While stories describing the settlement were published by local television stations and newspapers on their own initiative, these stories varied widely in the accuracy and relevancy of their coverage, and with a single exception were published only in Birmingham. Class members resided throughout the entire state. See pp. A-14 through 16, *infra*.

The district court also determined that burial policyholders would not have the right to opt out or remove themselves from the action (p. A-15, *infra*).

Following a hearing, the district court approved the settlement and entered final judgment in *Battle* in accordance with the settlement agreement (p. A-16, *infra*).

James J. and Laura F. Taylor and David A. Elrod held paid up policies. As a result, they were given no notice of the pendency of the *Battle* action or the proposed settlement. Mr. and Mrs. Taylor and Mr. Elrod were residents of Limestone County, Alabama and did not receive Birmingham television stations or read Birmingham newspapers. As a result, they were never informed, from any source, of the pendency of the *Battle* action or the proposed settlement. In fact, none of the petitioners received notice of the pendency of *Battle* or the proposed settlement until the final judgment was asserted as a defense by Liberty National in 1984 in the petitioners' state court actions. See pp. A-17 through 18, *infra*.

The District Court's Analysis of the Petitioners' Due Process Challenge[4]

In its order denying petitioners' Rule 60(b)(4) motion for relief from the final judgment in *Battle*, the district court held that the notice provided to the policyholder class was suffi-

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[4] The court of appeals affirmed the district court's order without opinion. For this reason, petitioners have referred in this petition to the district court's order in discussing the basis for the decision of the court below.

cient and that petitioners were bound by the final judgment, even though they and their decedents had not been given notice by the district court and were not given the right to opt out of the action.

The district court found that "the true measure of the notice required by due process is the cohesiveness or unity of the class" (p. A-32, *infra*). 770 F. Supp. at 1516. The district court recognized that monetary claims were at stake in *Battle*, but concluded that the disposition of property worked by the final judgment, being an "across-the-board solution," was analogous to the granting of a claim for injunctive or declaratory relief (p. A-38, *infra*). *Id.* at 1519.

Because of the asserted cohesiveness of the class, the district court held that absentee class members were not entitled either to individual notice or to opt out of the class. The district court held that the judgment was binding on petitioners, even though they and their decedents had neither been given or received notice or had the opportunity to opt out of the action. The district court found that the notice directed by the court to paying policyholders and the "media" notice in the Birmingham area was sufficient to bind all burial policyholders, including the large number of paid up policyholders to whom no notice had been directed. See pp. A-39 through 40, *infra*. 770 F. Supp. at 1519-20.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed without opinion noting only that it was "not presented with any reversible error." *Battle v. Liberty Nat'l Life Ins. Co.*, 974 F.2d 1279 (11th Cir. 1992). See p. A-2, *infra*.

REASONS FOR GRANTING THE WRIT

I. The district court's decision that the final judgment in *Battle* bars subsequent claims for money damages by absentee class members even though they were given no notice of the *Battle* action conflicts with the decisions of this Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The district court found that individual notice to absentee class members in *Battle* was not required because of the cohesiveness or unity of the class. The district court's order extends the binding effect of a class action on absentee class members far beyond what the decisions of this Court have held to be constitutionally permissible.

The first and most important of this Court's decisions which conflict with the decision of the district court is *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). *Mullane* involved a proceeding brought under a New York statute for the settlement of the accounts of the holders of a common trust fund. The New York statute provided only for notice by publication to the holders of interests in the fund. The bank, at the time each account was established, had notified all persons having an interest in the account by mail. A guardian appointed to represent persons having an interest in the fund appeared and asserted that notice given by publication to the holders of interests in the fund was insufficient and violated the due process rights of the holders. The guardian's objections were overruled by the trial court and the trial court was affirmed by the Appellate Division and the Court of Appeals of New York. This Court reversed.

Initially, it is important to note that this Court treated the holders of interests in the fund as a class. "This type of trust," stated the Court, "presupposes a large number of small interests. The individual interest does not stand alone *but is identical with that of a class.* The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries." 339 U.S. at 319 (emphasis added).

The Court found that all persons having an interest in the fund could be barred provided the procedure adopted "accords full opportunity to appear and be heard." 339 U.S. at 313. At stake in *Mullane* were potential claims for money damages; the right to sue the trustee for negligent or illegal actions and unauthorized fees. The Court held that these potential claims constituted "property rights" which could not be taken from the holders without "notice and hearing" meeting "the standards of due process." 339 U.S. at 313.

The Court concluded that the interest of the state in securing a final determination of all potential claims against the fund must be balanced by the individual interests protected by the due process clause. "The fundamental requisite of due process of law is the opportunity to be heard." 339 U.S. at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). To assure the opportunity to be heard, notice must be given which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. The Court recognized that indirect means of notice, such as publication, may be employed to attempt to reach persons whose location cannot be ascertained or whose interests are conjectural. 339 U.S. at 317. However, as to beneficiaries with a known place of residence, publication is insufficient. "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318.

In *Mullane*, the interests and concerns of each of the holders of an interest in the fund were identical. Because the fund was a common fund, *Mullane* presented a textbook example of the most cohesive type of class. The Court did rely on this cohesiveness in its holding that "reasonable risks that notice might not actually reach every beneficiary are justifiable." 339 U.S. at 319. However, in face of the clear cohesiveness of the class, the Court made it clear that some form of notice must be directed to each member of the class — notice by mail to those whose names and addresses are available

— and notice by publication to those whose whereabouts are unknown or whose interests are contingent. "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." 339 U.S. at 318. *Mullane* establishes that "opportunity to be heard," not adequacy of representation, is the "fundamental requisite of due process of law." 339 U.S. at 314.

This Court in *Mullane* had the clear opportunity to follow the approach taken by the district court. The Court could have found that the notice by publication was in fact actual notice to some members of the class, that because of the cohesiveness of the class the members actually receiving notice could have presented all objections to the accounting which any class member could have presented, and that thus all persons holding an interest in the fund were bound. The Court did not take this approach.

The Court's decision in *Mullane* establishes four basic criteria which are applicable to notice in class actions which seek to bar claims for money damages:

> (1) notice reasonably calculated to apprise the class member of the pendency of the action and give the class member an opportunity to present his objections must be directed by the court to each member of the class;
>
> (2) notice by mail must be given to all members of the class whose names and addresses are available;
>
> (3) notice by publication or other indirect notice must be directed to all members of the class whose whereabouts are unknown; and
>
> (4) if notice is given in accordance with (1), (2) and (3) above, the fact that notice is not received by all members of the class will not violate due process requirements if all members of the class share identical interests.

Mullane was followed by the decision of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* in-

volved a class action which was brought in state court in Kansas to recover interest on royalty payments. Each of the 33,000 members of the class was provided with notice by first class mail. The notice described the action and informed class members that they could appear in the action by person or by counsel. The notice stated that each person notified would be included in the class unless he opted out of the suit by signing and returning a request for exclusion. The defendant contended that the opt out notice, which required that a request for exclusion be returned, was insufficient to bind non-residents of Kansas, who did not possess "minimum contacts" with the state.

The Court initially noted that the individual claims of members of the class for money damages each constituted "a chose in action" which is "a constitutionally recognized property interest." 472 U.S. at 807. The Court then set forth the applicable due process requirements, including notice:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [quoting *Mullane*]. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

472 U.S. at 811-812 (citations omitted).

The Court found that the notice given in *Shutts* met these requirements.

Shutts reconfirms the teaching of *Mullane*. "The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 472 U.S. at 812. While the class in *Shutts* was cohesive, in that the claims of class members had identical legal and factual bases, the Supreme Court did not regard this fact as having any impact on its analysis.

Mullane and *Shutts* establish that individual monetary claims cannot be barred, regardless of the cohesiveness of the class, unless individual notice is directed by the court to all class members. When, as here, the names and addresses of the members of the class can be determined through reasonable effort, notice by mail must be given to all absentee members of the class whose names and addresses are available. The required notice, which was not given to petitioners or their decedents, is a basic component of petitioners' due process rights under the Fifth Amendment to the Constitution of the United States.

II. The district court's decision that due process does not require that absentee members of the policyholder class in Battle be given the opportunity to opt out or remove themselves from the action in order to bar subsequent claims for monetary damages is in conflict with the decision of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court clearly and unequivocally held that absentee class members must be given the right to opt out or request exclusion from a class action in order to bind absentee class members concerning claims for monetary damages. "[W]e hold that due process requires at a minimum that an absent plaintiff be provided with the opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812.

The district court refused to follow *Shutts*' mandatory requirement that opt out rights must be provided if claims by absentee class members are to be barred. The district court stated:

> [T]his court also believes that the reference in *Shutts* to the right afforded absent class members in that case to opt-out of the class was intended to indicate not that such a measure was *required* by due process, but rather that it together with the other aspects of the notice provided by the Kansas court was constitutionally *sufficient*.

770 F. Supp. at 1518, n.51 (emphasis in original).

Contrary to the view expressed by the district court, this Court's opinion on this point was a holding setting forth what the Court considered necessary "at a minimum" for due process requirements to be met. Petitioners have found no other decisions, other than that of the district court in this case, which have regarded *Shutts*' discussion of opt out rights as expressing something less than a mandatory constitutional requirement. While *Shutts* involved a class action in Kansas state court, it applies equally to federal class actions. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760, 766, n. 4 (3rd Cir. 1989), *cert. denied sub nom. Chicago Title Ins. Co. v. Tuscon Unified School Dist.*, 493 U.S. 820 (1989).

The application of the Court's holding in *Shutts* with respect to opt out rights is outlined by the Court's initial statement leading to its discussion of due process issues: "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protections." 472 U.S. at 811-812. The major issue in *Shutts* was to determine the binding effect of the class action on absentee members of the class. Thus the focus of the Court was properly directed toward determining what minimum due process requirements are necessary in order to bind absent class members. The holding of the case sets forth the requirements necessary to bind an absent class member on "a claim for money dam-

ages," which was the type of claim which had been adjudicated in *Shutts*.

In order to determine the preclusive effect of a class action, one must look to the type of claim sought to be barred in the subsequent proceeding. If that claim is one for money damages, the class proceedings must have provided all of the procedural due process protections specified in *Shutts*, including the right to opt out of the action. The Court's holding on due process ties back to the Court's earlier finding that a chose in action (a claim for money damages) is a constitutionally protected property interest. 472 U.S. at 807. The right of an absentee class member to opt out of the action is a basic due process right and must be provided if the class action judgment is to bar a claim for money damages.

III. The district court's decision that individual notice to absentee members of the policyholder class in *Battle* was not required is in conflict with the decision of the Supreme Court of Alabama in *Taylor v. Liberty National Life Insurance Co.*, 462 So. 2d 907 (Ala. 1984).

The district court in its order found that petitioners were bound by the final judgment in *Battle* even though they and their decedents had no notice of the pendency of the action or the proposed settlement. The Supreme Court of Alabama in *Taylor* held that due process required that the district court direct notice to all of the absentee class members in *Battle* and that because the required notice was not given, the Taylor heirs and personal representatives were not bound by the final judgment which was entered by the district court in *Battle*. The order of the district court and the decision of the Supreme Court of Alabama in *Taylor* involved the same parties and reached directly contrary results on the same federal constitutional issue.

This direct conflict on an important constitutional issue should be resolved by this Court.

IV. The issues presented by this Petition are important.

The issues presented by this Petition with respect to whether notice and opt out rights must be provided to absentee class members in order to bind absentee class members by a final judgment entered in a class action are important issues which arise in every class action in which property rights are at stake.

In addition to the general importance of the issues before the Court, the questions presented are directly relevant to the 1,500,000 Alabama residents who were holders of Liberty National burial policies at the time of the final judgment in *Battle*. Many thousands of these policyholders had paid up policies and were given no notice of the pendency of *Battle* or of the proposed settlement. In addition, not one of the 1,500,000 policyholders was allowed to opt out or remove himself from the action, despite the fact that the final judgment had a substantial effect on the policyholders "vested rights" under their policies and barred future claims for damages by policyholders based upon Liberty National's failure to furnish the complete funeral service provided under the policies.

A decision by this Court granting a writ of certiorari and a decision on the merits will provide important guidance for the federal and state courts on basic issues relating to the binding effect of a judgment in a class action on absentee class members and will, in addition, determine the rights of the 1,500,000 Alabama residents who held Liberty National burial policies when the final judgment was entered in *Battle*.

CONCLUSION

Petitioners respectfully submit that this petition for certiorari should be granted. The decision of the district court is in conflict with important decisions of this Court on basic due process issues which determine the binding effect of a judgment in a class action on absentee class members. In addition, the district court's decision is in conflict with a decision of the Supreme Court of Alabama involving the same parties

and issues. A decision by this Court will provide guidance on these important issues to the federal and state courts and will determine the rights of the many Alabama residents who were insured under Liberty National burial policies at the time of the *Battle* final judgment.

Respectfully submitted,

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April 26, 1993

APPENDIX

APPENDIX A

Edgar H. BATTLE, d/b/a Edgar H. Battle
Funeral Home; et al.
Plaintiffs,

James L. Taylor, individually, and as the
administrator of the Estates of James Jackson Taylor and
Laura F. Taylor, deceased, Frances Louise Taylor Spence,
Debra Taylor, Diane Taylor Stafford, Phillip Taylor, Gretta
Taylor and Annie J. Elrod, individually and as executrix of
the Estate of David A. Elrod, deceased,
Plaintiffs-Intervenors-Appellants,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY;
Brown Service Funeral Homes Company, Inc.;
Service Insurance Company of Alabama,
and all others similarly situated,
Defendants-Appellees.

No. 91-7700.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

October 14, 1992

Before ANDERSON, Circuit Judge, HILL and ESCHBACH*, Senior Circuit Judges.

PER CURIAM

Appeal is taken from the judgment of the Honorable Myron H. Thompson denying the intervenors' 60(b)(4) motion for relief from judgment. That judgment was accompa-

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

nied by a detailed memorandum order, *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499 (N.D.Ala. 1991). We have carefully reviewed the record, Judge Thompson's dispositive order and opinion, and the briefs of counsel. Oral argument was heard in Atlanta on June 25, 1992.

We are not presented with any reversible error on the part of the district judge. The judgment dismissing the case is AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DISTRICT OF
ALABAMA, SOUTHERN DIVISION

EDGAR H. BATTLE etc., et al.,	)	
Plaintiffs,	)	
JAMES L. TAYLOR, et al.,	)	
Plaintiff-Intervenors,	)	Civil Action No. 70-H-752-S
v.	)	
LIBERTY NATIONAL LIFE INSURANCE COMPANY, et al.,	)	
Defendants	)	

ORDER

This lawsuit, filed in 1970 on behalf of a class of Alabama funeral homes, has clung to life with a tenacity which, if it could be matched by humans, would undoubtedly have obviated the need for the "burial insurance" that has been the subject of contention in the case for over 20 years. Despite a final consent decree entered in 1977, the cause is now again before the court on a motion for relief from judgment, brought pursuant to Federal Rule of Civil Procedure 60(b)(4) by several holders of such burial insurance policies issued by defendant Liberty National Life Insurance Company. Movants specifically assert that several key provisions of the 1977 consent decree are "void" as to them and other similarly situated absent members of a class of policyholders

because it was entered without providing adequate prior notice to them, in violation of their rights to procedural due process. Liberty National has objected, claiming that the Rule 60(b) motion is due to be denied as a matter of law.[1] The court has stayed discovery pending a determination of the legal sufficiency of the Rule 60(b) motion.[2] For the reasons explained below, the court finds that, even accepting movants'

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[1] Liberty National, together with the original plaintiff class of funeral directors in this lawsuit as well as several of its members, Rideout's-Brown-Service, Inc., and Aubrey Carr and Carr Service Enterprises, Inc., have opposed the Rule 60(b) motion. Carr Service is the funeral home that was responsible for the funerals of burial policyholders James J. Taylor and Laura F. Taylor, whose children are among the individuals that have brought the Rule 60(b) motion now before the court. This home was also one of the defendants in a state court suit brought by the Taylors' heirs. *See* section I(D) of the court's order. However, for the sake of simplicity and because their positions and arguments with respect to the motion mirror those of Liberty National, the court does not treat the funeral directors separately in this order, but refers to the non-movants collectively as "Liberty National." Furthermore, in order to avoid confusing Rideout's-Brown-Service, Inc., an existing funeral home, with Brown-Service Funeral Homes Company, Inc., a subsidiary of Liberty National, *see* section I(A), *infra*, the court hereinafter refers to the former simply as "Rideout's."

[2] Carr and Carr Services Enterprises have filed a "Motion to Strike" the Rule 60(b) motion, arguing, as Liberty National does in its "Objection," that the Rule 60(b) motion lacks merit on its face. Accordingly, the court has evaluated the Rule 60(b) motion under a standard similar to the one applicable to a motion to dismiss a complaint. A complaint should not be dismissed on a motion under Rule 12(b)(6) unless "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989), *quoting Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). *Accord Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988), *cert. denied*, U.S. , 110 S. Ct. 2562, (1990). Accordingly, in section I of this order, the court, unless otherwise indicated, articulates the facts relevant to the Rule 60(b) motion in the light most favorable to movants. Readers interested in a further discussion of the long and tangled history of this litigation are referred to the following published decisions: *Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39 (1974); *Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984); *Battle v. Liberty National Life Ins. Co.*, 660 F. Supp. 1449 (N.D. Ala. 1987) (Hancock, J.); *Battle v. Liberty National Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989).

allegations as true, they were not denied due process in the adoption of the 1977 consent decree. Accordingly, the court concludes that the Rule 60(b) motion should be denied.

I.

A. *The Burial Policies*

Liberty National began issuing burial insurance policies to residents of Alabama in 1944.[3] Individuals purchasing such insurance were obligated to make small weekly payments for a number of years until their policies were paid in full.[4] In return, Liberty National contractually agreed to provide certain funeral benefits to the policyholder on the event of her death. The benefits available depended in part on which of the three types of burial policies the deceased had selected. The most common policy, whose "retail value" Liberty National represented to policyholders as being $300, was one that guaranteed the purchaser a wooden casket. The second category of policies, with a retail value of $600, provided instead for a metal casket.[5] Third and finally, the company also marketed policies under which the insured would receive and be buried in a "vault."[6] The retail value of almost all of the vault policies was $100.[7] A substantial proportion of the vault

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[3] From the 1920's until it merged with Liberty National in 1944, Brown-Service Insurance Company had issued such policies.

[4] The amount of each policyholder's weekly payments was tied to the retail value of her policy.

[5] With both kinds of casket policies, the casket itself constituted the bulk of the value of the available benefits. For example, the wooden casket policies, with a retail value of $300, promised the holder a casket with a retail value of $250.

[6] Despite the different nomenclatures used throughout this litigation, the court hereafter refers to "casket" policies and "vault" policies as the two types of "burial insurance" or "burial policies" offered by Liberty National.

[7] A small portion of the burial policies had retail values different from these usual figures. For example, fewer than 10% of the vault policies had a retail value of either $150 or $200. Similarly, a small percentage of the casket policies were valued by Liberty National at between $225 and $800, other than $300 or $600.

policies specified that the insured would be provided a certain type of metal or concrete vault. These were not the only variations among the types of burial insurance sold by Liberty National; under the two varieties of casket policies, Liberty National also promised to furnish such merchandise and services as a burial suit or dress, embalming and preparation of the deceased's remains, use of the funeral parlor, assistance in conducting the service, use of a funeral coach for transportation, and transportation of the remains within certain distances. However, holders of vault policies were not entitled to receive such funeral services in addition to the vault. As a result, many if not most of those persons who had purchased a vault policy had also bought a burial policy of some sort to supplement it.

Despite the use of the phrase "retail value" in the policies, benefits equivalent to those guaranteed by each policy usually could be purchased at retail from a funeral home only at a price greater than the retail value of the policy. In other words, the family of an uninsured deceased would likely have had to pay a funeral home more than $300 to obtain a casket and other funeral benefits identical to the ones guaranteed an insured under Liberty National's $300 wooden casket policy. The difference was greatest in the case of the vault policies; at the time of the 1977 consent decree, it appeared that the "$100" vault described in the vault policies was being sold at retail by funeral directors for approximately $200 to $300.[8]

In order to satisfy its obligations under these policies, Liberty National contracted for its wholly owned subsidiary, Brown-Service Funeral Homes Company, Inc., to provide such funeral benefits.[9] Brown-Service, in turn, maintained

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[8]Thus the phrase "retail value" as used in this order, refers to the value of a burial policy as represented to purchasers by Liberty National and does not necessarily denote the actual market value or price of the merchandise or services available under the policy.

[9]In its early years in the burial insurance business, Liberty National and Brown-Service actually owned and operated a number of funeral homes. However, this practice ceased after 1954, as a result of an anti-trust suit brought by the United States against Liberty National.

agreements with various funeral directors throughout Alabama, which obligated the directors to furnish merchandise and services to Liberty National policyholders at stipulated prices to be paid by Brown-Service.[10] Accordingly, policyholders could only obtain benefits under their policies from such "authorized" funeral homes. Thus, if the family of a deceased insured opted to use an unauthorized funeral home, they would receive only a casket under the casket policies, and no benefits whatsoever if the deceased had held only a vault policy. Moreover, were a policyholder to die outside Alabama or more than 35 miles from the nearest authorized funeral director, she would be entitled under the terms of the policy to only the cash equivalent of a percentage of her policy's retail value, 50% in most cases involving casket policies.[11]

None of the burial policies, however, directly addressed the issue, later to be sharply disputed, of Liberty National's obligations in the event that the family of a deceased policyholder requested from an authorized funeral home merchandise or services beyond those guaranteed under the policy. Such a contingency, known as an "oversale," occurred in more than 80% of the funerals of individuals covered by Liberty National burial policies, usually where the family selected a more expensive casket than that provided for by the burial insurance. The practice in the funeral industry in Alabama prior to this litigation was for a funeral home to provide a credit in the event of an oversale, usually in the amount of

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[10] In return for providing the merchandise and services guaranteed under the policies, authorized funeral homes received fees from Brown-Service substantially less than the retail values of the policies. *See Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39, 46 (5th Cir. 1974) ("if the policy value is $300, the director receives $90; if the policy value is $600, the director receives $180), *cert. denied*, 419 U.S. 1110, 95 S. Ct. 784 (1975).

[11] Thus the heirs of a holder of a wooden casket policy, with a purported retail value of $300, would receive a payment of $150 if the individual died outside the prescribed areas. In the case of a $100 vault policy, Liberty National would provide a cash payment of $75.

the retail value of the burial policy.[12] However, despite this custom, Liberty National and the movants, much like the parties to the original litigation, sharply disagree about what the scope of the company's legal obligations were when an oversale occurred prior to the 1977 consent decree. According to Liberty National, it was at most required to provide a cash payment or credit equal to one-half the retail value of the policy, as it did in cases in which the policyholder died out of state or more than 35 miles from an authorized funeral director.[13] However, movants have taken the position that, where a family opted for a more expensive funeral than the one provided for under the deceased's burial policy, Liberty National was legally obligated to allow a credit for the retail value of the items oversold — usually the casket — and to furnish all other merchandise or services guaranteed under the policy.[14]

Prior to the 1977 consent decree, a similar dispute was voiced by the parties to the original litigation as to the exact nature of Liberty National's contractual liability under the vault policies. Although it appeared to be a common practice for funeral directors to transport and install vaults provided under the burial policies for free or for a nominal charge, the parties disagreed as to whether such a service was in any respect covered under the policies. Moreover, because some

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[12] For example, when the family members of a deceased covered by a $300 wooden casket policy chose to purchase a different casket, costing $800 for example, they would be billed by the funeral home for the cost of this casket plus the cost of all services provided, but would receive a $300 discount off the total price. Thus, if the services were priced at $500, the family would pay a total of $1000 [($800 + $500) - $300].

[13] Thus, in the example offered in note 12, *supra*, the family would receive a discount of only $150, and would pay a total of $1150 for the funeral.

[14] Therefore, in the hypothetical in note 12, *supra*, the family would receive a discount of $250 — the retail value of a wooden casket, according to the policy — off the price of the more expensive casket, and would still receive, as benefits under the funeral policy, all other services. In this scenario, the family would be liable to the funeral director only for a total of $550 ($800 - $250).

of the vault policies referred to a specific type of a vault and others referred simply to a $100 vault or a vault with a value of $100, there was apparently also some disagreement as to whether the holder was entitled to a vault of the kind valued at $100 at the time he purchased the policy, or, because the price of vaults had since increased, a vault of lesser quality, valued at $100 at the time of his death.

By 1970, two years prior to the time Liberty National ceased selling this form of funeral benefit policy, 50% of the persons who died each year in Alabama were covered by such policies, and the vast majority of Alabama funeral homes maintained contractual relationships with Brown-Service.[15] *See Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39, 45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975). By 1977, when final judgment was entered in this case, approximately 3.5 million such policies were outstanding, owned by about 1.5 million Alabamians.[16] Liberty National's total liability on these policies was in the neighborhood of $1.5 billion.

B. *The Original Lawsuit*

Discontented with the control over the funeral industry exercised by Liberty National and Brown-Service and the limited profitability of providing funerals to burial policyholders, a class of authorized and unauthorized funeral home owners filed suit against both companies in 1970.[17] In this action, *Battle, et al., v. Liberty National Life Ins. Co., et al.*, CV 70-H-752-S, the owners charged these defendants with violat-

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[15] After 1972, the company sold only policies that paid cash benefits upon the holder's death, known as "funeral expense" policies. Such policies are not the subject of this litigation.

[16] As the court has noted, individuals often purchased multiple policies to increase the burial benefits — either the quality of the casket or the funeral services — available to them when they died.

[17] When the case was filed, the class approximately included 300 owners of 400 funeral homes.

ing federal antitrust statutes and sought both damages and injunctive relief. The complaint in *Battle* charged Liberty National and Brown-Service with price fixing, monopolizing trade, and engaging in illegal tying arrangements, in violation of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and the Clayton Act, 15 U.S.C.A. § 14. The funeral homes sought approximately $200 million in damages and systemic injunctive relief against Liberty National and Brown-Service.[18] A suit by funeral home owners virtually identical to *Battle, Holman, et al. v. Liberty National Life Ins. Co., et al*, CV 76-H-0813-S, was initiated in this court in June 1976. Between 1970 and 1977, the *Battle* case was extensively litigated.[19]

In 1972, the third in a trilogy of class actions against Liberty National and Brown-Service, this one on behalf of burial policyholders, was filed in this court. Styled *Campbell, et al. v. Liberty National Life Ins. Co., et al.*, CV 72-H-569-S, the complaint essentially reiterated the antitrust claims presented in the *Battle* suit, arguing that policyholders had suffered injury from defendants' anti-trust violations through higher prices charged by funeral directors. In addition, the *Campbell* plaintiffs charged defendants with fraud, on the basis that the actual amount paid by Brown-Service to a funeral director for the benefits conferred under any of the burial policies fell far

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[18]The funeral homes requested an injunction (1) annulling all outstanding contracts between funeral homes, and Liberty National and Brown-Service; (2) requiring Liberty National to divest itself of Brown-Service; (3) forbidding Liberty National and Brown-Service from engaging in the funeral home business; and (4) requiring Liberty National and Brown-Service to pay funeral homes a market rate for merchandise and services provided by the homes under burial policies.

[19]*See Battle v. Liberty National Life Ins. Co.*, 660 F. Supp. 1449, 1452 (N.D. Ala. 1987) (Hancock, J.). The district court initially dismissed that lawsuit, pursuant to Federal Rule of Civil Procedure 12(b)(6), on various grounds relating to the viability of plaintiffs' anti-trust allegations. However, the Fifth Circuit reversed and returned the case to the district court for further proceedings. *See Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974).

short of the stated "retail value" of such a policy.[20] With respect to their anti-trust claims, the policyholders requested the same extensive injunctive relief as the plaintiffs in *Battle*, and also sought $60 million in treble anti-trust damages. As for the fraud claims, the complaint in *Campbell* asked that Liberty National and Brown-Service be required to: (1) "reveal to prospective purchasers of burial insurance . . . the amounts actually paid out by defendants under said policy"; (2) "return a part of the premium to plaintiffs and . . . [reduce] all future premiums . . . in accordance with service and materials rendered under the policies"; (3) "amend[]" the policies "to provide for payment of cash benefits in the face amount" of the policies "in lieu of requiring beneficiaries . . . to accept the funeral and burial services" specified in the policies; and (4) pay policyholders "punitive and compensatory damages" in the amount of $60 million.

Shortly before *Campbell* was filed in this court, a similar action by policyholders, *Johnson v. Liberty National Life Ins. Co.*, was initiated against the same defendants in the Circuit Court of Conecuh County, Alabama. Although that suit, like *Battle*, was actively pursued through discovery and other preliminary proceedings, the *Campbell* suit lay dormant until 1975, when defendants filed a "Motion to Determine Propriety of Class Action Under Rule 23(c)(2)."[21] In this motion, Liberty National and Brown-Service opposed the certification of a plaintiff class, but argued, in the alternative, that if the case was to proceed as a class action, then Federal Rule of Civil Procedure 23 required that the named plaintiffs and their counsel

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[20] *See* note 10, *supra*. The policyholders' state law fraud and misrepresentation claims are discussed in only three pages. The remaining 38 pages of the complaint are devoted to their anti-trust allegations.

[21] In the fairness hearing on the 1977 consent decree, the court observed that *Campbell* was filed as a "holding action in the event something happened adversely to the state court lawsuit." Prior to the 1975 proceedings, the only action taken by either side in *Campbell* involved several dispositive motions filed by defendants shortly after the suit was initiated in 1972. The court never ruled on these motions.

provide notice of the suit by first-class mail to all members of the class of policyholders, estimated at 2 million persons. Asserting that the companies could, with reasonable effort, compile and furnish the plaintiffs with a listing of the names and addresses of all such policyholders, Liberty National and Brown-Service concluded that the court should refuse to certify a plaintiff class unless the named plaintiffs and their counsel indicated they were prepared to assume the expense, estimated at $400,000, of providing mail notice to the policyholder class. At a hearing on this motion, counsel for the policyholder class asked the court to stay the *Campbell* case for three months, pending further proceedings in *Battle*. The court apparently issued no ruling on either the plaintiffs' or the defendants' motions.

C. *The Settlement*

In 1977, attorneys for Liberty National and Brown-Service and attorneys for the funeral director classes and the policyholder classes initiated settlement negotiations covering all of these lawsuits. In September 1977, they entered into an agreement to settle the three actions pending in this court, *Battle*, *Holman*, *Campbell*, and dismiss with prejudice the state court case, *Johnson*. Procedurally, this compromise provided that the federal lawsuits would be consolidated and two temporary settlement classes created, one consisting of the funeral home owners and the other of burial policyholders. The substantive provisions of the proposed settlement require some discussion because they are both complex and crucial to the claims raised in the Rule 60(b) motion now before the court. First, the agreement generally provided the funeral home owners with much of the injunctive relief requested in the various suits and aimed at loosening the control Liberty National and Brown-Service had previously exercised over the merchandise and services the funeral homes offered and the prices they charged. Most significantly, the two companies agreed to allow any funeral home that met basic health and other state regulatory standards to service its

burial policies — in other words, to become an "authorized" funeral home.[22] The settlement also called for Liberty National and Brown-Service to pay a sizable amount in attorney's fees to plaintiffs' counsel in the various lawsuits.[23]

Furthermore, and most salient to the court's present inquiry, the agreement clarified or reformed the liabilities of Liberty National and Brown-Service, the corresponding rights of casket and vault policyholders, and, by extension, the obligations of authorized funeral directors to customers in the case of funerals covered by burial insurance. First, it resolved the uncertainty that had attended "oversales" by adopting what had been the customary practice; thus the settlement provided that in the event the family of a deceased policyholder chose more expensive merchandise or services than were available under a policy, the funeral director would charge the family for all such funeral benefits, but discount the retail value of the policy.[24] Second, the settlement provided that holders of vault policies would be entitled not to an actual vault, but only to a cash payment equal to the retail value of the policy, regardless of where they died or whether their funeral was handled by a home affiliated with Brown-Service.[25]

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[22] In addition, the settlement specifically obligated Brown-Service to increase the fees funeral directors received for providing benefits under a burial policy to one-third of the stated retail value of the policy, and also created a mechanism to allow funeral directors to share in some of the profits henceforth earned by Brown-Service.

[23] Attorneys for the plaintiffs and plaintiff-intervenors in *Battle* were to receive approximately $1.25 million. Lawyers in *Campbell* and *Johnson* would be paid $100,000.

[24] If the holder of a casket policy died outside Alabama or more than 35 miles from an authorized funeral director, she would, as before the settlement, receive a cash payment equal to one-half the stated retail value of the policy. Similarly, if the family of an insured who died within a prescribed area opted not to use an authorized funeral director, they would, as before, be entitled only to the casket guaranteed by the policy.

[25] From the standpoint of policyholders, the agreement would bring about several other, more minor changes, including court supervision to ensure the quality of the caskets provided under the policies, and an upgrading to

Pursuant to the settlement agreement, the court consolidated the four lawsuits described above under the heading of *Battle*, established two temporary settlement classes consisting, respectively, of funeral directors and burial policyholders, and tentatively approved the agreement pending a fairness hearing. The settlement agreement had essentially left the issue of notice to members of the funeral director and policyholder class in the hands of the district judge.[26] Accordingly, the court certified the funeral director class under Federal Rule of Civil Procedure 23(b)(3), determined that the names and addresses of the approximately 350 members of this class could be "ascertained through reasonable efforts," and that the "best notice practicable" to the funeral directors was "written notice by mail." As for the policyholder class, the court determined that it met the requirements of Rule 23(b)(2), that it included more than one million members whose "names and addresses cannot be ascertained through reasonable effort," and that the "best notice practicable" for such policyholders would be "written notice" to be delivered by each agent of Liberty National in the course of the agent's regular weekly visits to collect premiums from policyholders, for a period of four consecutive weeks beginning at least 45 days prior to the fairness hearing. The court, however, did not address the question of notice to "paid-up" policyholders

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$300 of burial policies with values less than $300, and to $600 of those with values between $300 and $600. Furthermore, the provision permitting more funeral homes to become agents of the defendant companies would also indirectly benefit the policyholder class, to the extent it fostered an increase in the number of authorized funeral homes and thus avoided situations in which a covered policyholder died more than 35 miles from the nearest authorized home.

[26] The agreement provided only that "[n]otice shall be given as directed by the Court to members of the classes . . . pursuant to the provisions of [Federal Rule of Civil Procedure] 23," and at defendants' expense. However, the defendants reserved the right to rescind their agreement to the settlement, were the court to determine that class members were entitled to opt out of the settlement and should a "substantial" proportion of the class choose to so exclude themselves.

who were no longer required to tender weekly premiums to Liberty National and who, as result, no longer received visits from the company's agents.

The court approved a five-page notice of the settlement, which was subsequently distributed by Liberty National agents to policyholders during collection visits and other, additional contacts with those class members who were still paying premiums on their burial policies. This notice summarized the nature and history of the litigation, informed policyholders that the parties had agreed to a settlement, described its major provisions, and informed class members that they could file written objections to the settlement with the court and orally offer comments on the agreement at the fairness hearing, whose time and place were specified in the notice.[27] Specifically, the notice contained the following information about the settlement term regarding "oversales": "If funeral merchandise and services are purchased for the burial of the deceased insured, in addition to such services and merchandise as provided in the policy, the policyholder shall receive credit on the funeral bill for the full retail value of the benefits stated in the policy." As for the agreement on the rights of vault policyholders, the settlement stated: "Liberty National shall be required to perform the vault policies by paying in cash the retail value thereof stated in the policy in lieu of furnishing the vault otherwise provided." Finally, the notice informed recipients that if the proposed settlement were approved, a judgment would be entered foreclosing all claims "asserted or which might have been asserted in this class action." Unlike members of the funeral director class, policyholders were not afforded the chance to opt out of the settlement class.

Although the court's order provided for no formal notice by publication, several television stations and newspapers ran

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[27] The notice also provided recipients with the names and addresses of the various plaintiffs' counsel, but specifically instructed policyholders to direct any inquiries about the case to Liberty National.

stories on the settlement prior to the fairness hearing. However, these reports varied widely in the degree to which they accurately communicated the relevant provisions of the settlement. Moreover, with one exception, all the stories on the settlement were printed or broadcast in Birmingham, although members of the policyholder class resided throughout the state.

Both before and after the December 1977 fairness hearing, the court received and considered objections to the settlement by over 1,400 policyholders. Most of these class members were represented by one of two attorneys, each of whom also orally presented comments about the agreement to the court at the hearing. In addition, counsel representing the various parties to the litigation addressed the court and the approximately 200 persons in attendance at the hearing, with respect to the history of the litigation, the process by which an agreement was reached, and the substance of the settlement. A number of the policyholders in the audience later presented complaints and questions about the settlement to the court. Of the various written and verbal communications to the court, several dealt directly with the oversale provisions of the settlement, and many more were directed to the alteration in the rights of vault policyholders.

In January 1978, the court approved the settlement and entered final judgment in accordance with its provisions. In this judgment, the court found that the agreement reached by the attorneys was fair and reasonable to the policyholders, enumerated the various advantages of the settlement to the class members, and determined that the class satisfied the requirements of Rule 23. The court specifically indicated that the class was properly certified under Rule 23(b)(2), that the absent members were adequately represented, and expressed the opinion that delivery of notice via Liberty National agents, together with media coverage of the case, had succeeded in providing notice to approximately 90% of the policyholder class.

D. *The Collateral Attack in State Court*

The present dispute arises out of the funerals of James J. and Laura F. Taylor and David A. Elrod. Both the Taylors and Mr. Elrod had completed payments on their burial insurance at the time this litigation was settled in September 1977. Because Liberty National agents no longer called on them and they did not see any of the news stories regarding the settlement that were published or broadcast in Birmingham, they received no actual notice of the settlement. Mrs. Taylor purchased a $250 wooden casket policy from Liberty National in 1938, and supplemented it in 1955, transforming her policy into one for a $500 metal casket. Her husband bought similar insurance in 1946 and 1955, as a result of which he was covered under a $600 metal-casket policy. Mr. Taylor died in February 1982, and was followed by his wife in February 1983. Upon the death of each of their parents, the Taylors' children selected a more expensive casket than the one provided for in the burial policies. The charges for Mr. Taylor's funeral totalled over $1,600, from which the funeral home allowed a credit of $600, the value of the deceased's burial policies. The expenses for Mrs. Taylor's funeral eclipsed this figure, amounting to over $3,000. Again, the funeral home offered the children only a $500 discount, the retail value of Mrs. Taylor's policies. A similar scenario unfolded upon the death of David A. Elrod, who was also covered by Liberty National burial insurance. The funeral director selected by his widow, Annie J. Elrod, charged over $1,700 for the funeral, crediting her only with the $600 retail value of his casket policy.

In 1983 and 1984, the Taylors' estate and children and Mr. Elrod's estate and widow brought suit against Liberty National in the Circuit Court for Limestone County, Alabama. These actions challenged the refusal of the company and the funeral homes in question to provide the benefits to which these plaintiffs claimed the decedents had been entitled in the event of an oversale, namely, all the services specified in the policy and a credit for the retail value of the casket prom-

ised in the policy.[28] Liberty National asserted the res judicata effect of the final judgment in *Battle* as a defense to each of these suits, claiming that both the company and the funeral homes in question had fully performed the burial policies held by the Taylors and Mr. Elrod by offering a credit for the retail value of the policies. These pleadings provided the Taylors' children and Mrs. Elrod their first notice of the settlement in *Battle*. The Elrod suit and another similar case also brought in 1984, *Carroll v. Liberty National Life Ins. Co.*, were both removed by the company from the Circuit Court of Limestone County to this court. In the two lawsuits brought by the Taylors' children, the circuit court granted summary judgment in favor of Liberty National on the basis of the judgment in *Battle*.

On appeal, the Alabama Supreme Court, in a 4-2 decision, reversed the Circuit Court's ruling in the *Taylor* cases, holding that because the Taylors had not received adequate notice of the *Campbell* lawsuit or its settlement as part of the consolidated action in *Battle*, they had been denied due process and, for this reason, were not bound by the 1977 final judgment.[29] See *Taylor v. Liberty National Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984). The Supreme Court also suggested that the policyholder class from *Campbell* was included in the *Battle* settlement as a result of a collusive effort by Liberty National and the funeral directors to settle their own differences by extracting unconscionable, unrequited concessions from the policyholders.[30] *Id.*

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[28]The plaintiffs in those actions, who are also the movants in the dispute now before the court, were, in the case of the Taylors' policies, James L. Taylor, as administrator of the estates of Mr. and Mrs. Taylor; James L. Taylor, Frances Louise Taylor Spence, Deborah Taylor, Diane Taylor Stafford, Philip Taylor, and Gretta Taylor, individually as heirs and next-of-kin of the Taylors; and, in the case of Mr. Elrod's policy, Annie J. Elrod, as executrix of his estate and individually.

[29]The supreme court found that the policyholder class in *Battle* should have been certified under Rule 23(b)(3), instead of Rule 23(b)(2).

[30]For a critique of *Taylor*, *see* Recent Decisions, "A Second Bite at the Apple: Collateral Attack and Due Process in *Taylor v. Liberty National Life Insurance Co.*," 36 Ala. Law Rev. 1123 (1985).

Within two weeks of the Alabama Supreme Court's decision in *Taylor*, Liberty National petitioned this court, in *Battle*, to enjoin prosecution of the *Taylor*, *Elrod*, and *Carroll* state court cases, on the ground that all four actions were barred by the res judicata effect of the final judgment in *Battle*.[31] In response, the plaintiffs in these three cases defended the Supreme Court's decision in *Taylor*, suggested that this court lacked authority to enjoin state proceedings, and reiterated the due process arguments they had raised in state court. In March 1985, this court entered a preliminary injunction barring the Taylors from further prosecuting their two lawsuits against Liberty National. The court first determined that as a federal court it was not bound by the Alabama Supreme Court's determination of the res judicata effect of the final judgment in *Battle*, and that the Anti-Injunction Act, 28 U.S.C.A. § 2283, did not prevent it from enjoining these state court proceedings because such an injunction was necessary to effectuate the final judgment. Next, the court dismissed the issue of whether the policyholder class in *Battle* was denied due process as irrelevant to the merits of Liberty National's injunction request, although acknowledging that the Taylors and others similarly aggrieved could raise such contentions in this court in a Rule 60(b) attack on the final judgment in *Battle*.[32] Finally, apparently considering itself

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[31] In the 1977 judgment, the court expressly retained jurisdiction to enter any further orders necessary to construe or implement the judgment.

[32] This court referred several times to the availability of this avenue:

> If for whatever reason, there is to be an effort to unravel the settlement, *that effort must be pursued only in the court where the settlement was constructed*, with all the parties to the settlement having the opportunity to participate in the proceedings, and with, of course, appellate review in the only proper reviewing court.
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> * * * * * *
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> . . . [R]espondents initiated discovery calculated to inquire into the propriety of the certification of the policyholder class as a FRCP 23(b)(2) class, into the need for notice to the members of that class, and into the nature, extent and sufficiency of that notice . . . . conceding, without deciding that some of the matters embraced in

compelled to respond in some fashion to the Alabama Supreme Court's sharp condemnation of the process and substance of the *Battle* settlement, this court opined that the policyholder class in that case had properly been certified under 23(b)(2), that the absent members had received more than adequate notice, and, contrary to the Supreme Court's suggestion that the settlement class was "surreptitiously created," that there was no evidence that a fraud of any sort had been perpetrated on the court.

In May 1987, this court extended the injunction to the *Elrod* and *Carroll* cases and rendered it permanent, reiterating much of the discussion from its earlier order, including its comments on the immateriality of the due process dispute to the injunction question and its willingness to entertain a Rule 60(b) motion attacking the final judgment on due process grounds. *Battle v. Liberty National Life Ins. Co.*, 660 F. Supp. 1449, 1458 (N.D. Ala. 1987) (Hancock, J.). In July 1989, the Eleventh Circuit affirmed the injunction, but concluded its opinion by observing that the district court

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> the discovery effort would be relevant were there to be filed in this court (1) a motion under FRCP Rule 60(b) or (2) an independent action predicated upon a claim of inadequacy of representation of the policyholder class or upon a claim of fraud on this court, those matters are not germane to subject petition and have no bearing upon the issuance, *vel non*, of the requested injunction.
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> * * * * * *
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> The court is of the opinion that the members of the policyholder class are bound by that adjudication unless and until, in a proceeding initiated under Rule 60(b) or by an independent action brought in this court for that express purpose, it is first established that a fraud has been perpetrated upon the court or that the representation of the policyholder class was so inadequate as to constitute a denial of due process to some or all the members of the policyholder class.

Battle v. Liberty National Life Ins. Co., CV 70-H-752-S (N.D. Ala. March 26, 1985) (Hancock, J.) (Findings of Fact and Conclusions of Law), slip op. at 7-11 (emphasis in original).

> explicitly invited the state plaintiffs to make their due process challenge in federal court pursuant to a Fed. R. Civ. P. 60(b) motion or through an independent action. Their due process challenge is not foreclosed; it simply must be brought in the forum which has lived with this case for nearly two decades.

Battle v. Liberty National Life Ins. Co., 877 F.2d 877, 883 (11th Cir. 1989).

E. *The Rule 60(b)(4) Motion*

Their path into state court effectively blocked at this juncture, the Taylors' children and Mrs. Elrod took up the mantle of this court's suggestion by filing before it, in February 1990, a motion for relief from the *Battle* judgment pursuant to Rule 60(b)(4). This provision allows a party to be freed from the binding effect of a judgment determined to be "void." The motion specifically requested that the court dissolve the 1987 injunction barring the movants from proceeding with their state court lawsuits against Liberty National. These movants presented three separate attacks on the 1977 final judgment, each of which they sought to certify as a class action on behalf of similarly situated policyholders. Several of the movants, including Mrs. Elrod and two of the Taylor children, claimed to have both a derivative interest in the *Battle* judgment, as heirs of policyholders, and a direct interest, as policyholders themselves.

First, movants asserted that they and other absent members of the policyholder class in *Battle* whose burial insurance was completely paid for at the time of the September 1977 settlement were not bound by the subsequent judgment, on the ground that the court's failure to provide them with notice abridged their due process rights. Second, the Taylors' children and Mrs. Elrod alleged that the oversale provision of the *Battle* judgment was void as to all the absent policyholders because the notice delivered during collection visits by Liberty National agents was "incomplete and misleading" as to

the effect of this arrangement on the rights of policyholders, and because the court did not afford them the right to opt out of the lawsuit.[33] Third and finally, one of the Taylors' children claimed that she and other holders of vault policies had also been denied due process because the notice distributed by Liberty National agents failed to explain adequately the import of the change in the rights of vault policyholders contemplated by the settlement.[34] It is important to note that although the movants have at various points impugned the representation provided to the policyholders by the named plaintiffs and especially the class counsel who negotiated the *Battle* settlement, the movants have *not* challenged the 1977 final judgment on the theory that the policyholders were denied due process because they did not receive adequate representation.[35]

Liberty National subsequently filed an "objection" to the Rule 60(b) motion, and moved for a protective order to prevent the Taylors' children and Mrs. Elrod from proceeding with discovery.[36] Treating Liberty National's "objection" as a motion to dismiss, the court stayed discovery, pending a determination of the legal sufficiency of the Rule 60(b) motion. Movants and Liberty National have presented the court with extensive briefs, appendices containing all the relevant docu-

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[33] Movants specifically point to the settlement notice's use of the phrase, "full retail value of the benefits," in the notice's description of the credit to which policyholders would be entitled in the event of an oversale. According to movants, this language suggested a credit equal not merely to the stated retail value of the policy, represented on the face of the document, but rather to the greater, actual retail value — in other words, the retail cost — of the casket and services guaranteed by the policy.

[34] Movants specifically point out that the settlement notice did not inform policyholders that the price of an actual vault at that point in time was substantially greater than $100.

[35] Accordingly, the court does not address the issue of representation in this order.

[36] Aubrey Carr and Carr-Service Enterprises, the funeral home responsible for the Taylors' funerals, also entered the case at this point, moving to strike the Rule 60(b) motion.

ments and court records covering the 20-year history of this litigation, and oral argument.[37]

II.

A. *Threshold Issues*

Liberty National and the other non-movants have offered three arguments as to why the court should deny the Rule 60(b) motion without reaching the merits of the due process issues: delay, law of the case, and lack of standing. However, none of these arguments need detain the court long.

i. *Delay*

The company asserts that the movants are barred from attacking the final judgment because of inexcusable delay. Liberty National points out that even if the Taylors' children and Mrs. Elrod had no notice of the *Battle* settlement at the time it was entered, they learned of it in 1984 through the company's pleadings in the state court lawsuits. Furthermore, this court's preliminary and permanent injunction orders in 1985 and 1987 specifically directed movants' attention toward the availability of the Rule 60(b) avenue. Nevertheless, they did not file such a motion until 1990, 13 years after the final judgment. Relying on the requirement that a Rule 60(b) motion be made "within a reasonable time," Liberty National contends that such a lack of "diligence" lends a sufficient basis to deny the motion summarily.

The court rejects this assertion by the company for two reasons. First, the court does not believe that movants displayed a lack of diligence or otherwise sat on their rights. Indeed, they have repeatedly pressed their due-process claims since Liberty National raised the *Battle* judgment as a res judicata bar to their state court actions. Although this court and the Eleventh Circuit ultimately determined that they had chosen

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[37] Counsel for the funeral director class and several funeral homes have also filed briefs and offered oral argument.

the wrong forum in which to resolve this dispute, there is no evidence that movants were guilty of bad faith or purposeful delay in exhausting such other avenues before bringing their 60(b) motion.[38] Second and more importantly however, it is well established that a motion under Rule 60(b)(4), challenging a judgment as "void" for lack of due process, is neither governed by the "reasonable" time requirement nor subject to the equitable doctrine of laches, but rather may brought at any time, at least absent "exceptional circumstances . . . difficult to imagine." *Bludworth Bond Shipyard v. M/V Caribbean Wind*, 841 F.2d 646, 649 & n.6 (5th Cir. 1988). *Accord In re Center Wholesale*, 759 F.2d 1440, 1448 (9th Cir. 1985); *Pacurar v. Hernly*, 611 F.2d 179, 181 (7th Cir. 1979); *Austin v. Smith*, 114 App. D.C. 97, 312 F.2d 337, 343 (D.C. Cir. 1962); C. Wright, A. Miller & M. Kane, 7A Federal Practice and Procedure, § 2862, at 197-98 (2d ed. 1986). Indeed, not only is a court normally precluded from denying a Rule 60(b)(4) motion as untimely, but, more broadly speaking, it has no discretion to refuse to grant the motion if it determines that the judgment is in fact void because of a failure of due process. *Bludworth*, 841 F.2d at 649; *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980); *Austin*, 312 F.2d at 343; C. Wright, A. Miller & M. Kane, 7A Federal Practice and Procedure, § 2862, at 197. Further, whether the movant possessed a meritorious claim or defense on the merits of the underlying action is irrelevant to the Rule 60(b)(4) determination. *Broadcast Music, Inc. v. M.T.S. Enterprises*, 811 F.2d 278, 280 (5th Cir. 1987); J. Moore, 7 Moore's Federal Practice, P 60.25[1], at 60-224 (1991). *See also Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87, 108 S. Ct. 896, 900, 99 L. Ed. 2d 75 (1988) ("Where a person has been deprived of . . . due process, it is no answer to say that in his particular case due process of law would

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[38] Nor has Liberty National demonstrated that it could reasonably have believed, at any time since the state court actions were filed in 1983, that the controversy had been finally put to rest.

have led to the same result because he had no adequate defense upon the merits") (internal quotation omitted).

ii. *Law of the Case*

Liberty National next argues that further consideration of movants' due-process claims by this court is barred by the "law of the case" doctrine. *See In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 n.3 (11th Cir.), *cert. denied*, U.S. , 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990). According to the company, this court determined in the 1977 final judgment that the policyholders had been provided adequate notice, and also considered and rejected the present movants' due-process contentions when it entered a preliminary and permanent injunction against their state court lawsuits in 1985 and 1987. However, the court now concludes that the company's law of the case defense to the Rule 60(b) motion also lacks merit. As for the 1977 final judgment, it is true that the court concluded that sufficient notice had been provided to the policyholder class. However, it is well established that a court adjudicating a dispute ordinarily cannot predetermine the res judicata effect of its own judgment, but rather that this can only be tested in a subsequent proceeding. *Gonzalez v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973); C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure, § 1789, at 245 (2d ed. 1986); Federal Rule of Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment. This is especially true where claims of due process are involved. *See Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940). Although the right of a party to attack collaterally the jurisdiction of a court that entered judgment against her may properly turn on whether she previously directly challenged jurisdiction and lost, *compare Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769, 774 (9th Cir.), *cert. denied*, 479 U.S. 987, 107 S. Ct. 580, 93 L. Ed. 2d 582 (1986), with *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985), an absent class member who mounts a meritorious due-process challenge to a class judgment — in other words,

who, like the movants in this case, claims she was functionally excluded from a proceeding because she received inadequate notice and was afforded no right to control the conduct of her personal cause of action — will, by definition, not have had an opportunity in the initial litigation to be heard on the issue of due process. Just as she is not bound by any decision on the merits, she is, for the very same reason, not bound by the initial court's determination that she received due process.[39]

Liberty National also suggests that the court's 1985 and 1987 injunction orders, arising from proceedings at which movants were directly involved, are law of the case on the issue of whether they together with the original policyholder class received sufficient notice. However, the court's rendition of the relevant statements by it and the Eleventh Circuit in section I(D) of today's order makes clear that not only did neither this court nor the Eleventh Circuit resolve the merits of movants' due-process claims in the injunction proceedings, but, indeed, both courts explicitly indicated that the Taylors' children and Mrs. Elrod were free to raise such claims through a Rule 60(b)(4) motion. *See also In re Real Estate Title & Settlement Service Antitrust Litigation*, 869 F.2d 760, 764 & n.1 (3rd Cir.), *cert. denied*, U.S. , 110 S. Ct. 77 (1989). *Compare Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987).

iii. *Standing*

Rule 60(b) entitles "a party or a party's legal representative" to seek relief from a final judgment. Rideout's, a mem-

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[39] Indeed, were the court to accept Liberty National's theory, it would essentially mean that absent class members could never collaterally challenge a class-action judgment as violating their rights to due process, for in entering such a judgment or in previously certifying the class, a court will almost always have determined, as a prerequisite to such, that the members have been provided the appropriate notice, representation, and opt-out rights. *See In re Real Estate Title & Settlement Services Anti-trust Litigation*, 869 F.2d 760, 769 (3rd Cir.) ("ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme"), *cert. denied*, U.S. , 110 S. Ct. 77 (1989).

ber of the funeral home class in *Battle* which has joined Liberty National in opposing the Rule 60(b) motion now before the court, contends that the Taylors' children and Mrs. Elrod lack standing to collaterally attack the final judgment in *Battle* because they were neither parties nor representatives in the original litigation. Contrary to this argument, however, the court believes that the movants do have standing to bring a Rule 60(b) challenge.[40] First, the court has, in another order entered today, granted their motion to intervene formally in the *Battle* case, pursuant to Rule 24; thus, even technically speaking, the Taylors' children and Mrs. Elrod are now parties to the lawsuit. Second, the court previously included them as parties to the case during the 1985 injunction proceedings.[41] Third and most importantly, as persons whose "rights were directly affected by the final judgment," they fit within the category of individuals with standing under Rule 60(b).[42] *See Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517, 1520-21 (11th Cir. 1987).

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[40] Even if there were some doubt as to movants' standing, Rule 60(b) appears to invest a district court with the authority to vacate a judgment *sua sponte*. *See Simer v. Rios*, 661 F.2d 655, 663 n. 18 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S. Ct. 1773, 72 L. Ed. 2d 177 (1982); *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 n. 2 (2nd. Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 758 (1978); *United States v. Jacobs*, 298 F.2d 469, 472 (4th Cir. 1961).

[41] *See Battle v. Liberty National Life Ins. Co.*, CV 70-H-752-S (N.D. Ala. March 26, 1985) (Hancock, J.) (Findings of Fact and Conclusions of Law), slip op. at 4-5.

[42] As with Liberty National's "law of the case theory," adoption of Rideout's niggardly standing rule would work a manifest injustice by operating as an across-the-board bar on collateral attacks to class judgments by absent members, even where based on grounds as fundamental as due process. *See* note 39, *supra*. *In re Four Seasons Securities Laws Litigation*, 525 F.2d 500 (10th Cir. 1975), the principal case cited by Rideout's for the proposition that absent class members lack standing to challenge collaterally a judgment under Rule 60(b), is distinguishable from this lawsuit, as the movant there did not raise a due-process challenge but rather sought to use the device of Rule 60(b) to argue that "the settlement was not a good one for the class in that more money should have been exacted from . . . defendants." *Id.* at 503.

B. *The Merits*

i. *Notice of the Action and the Right to Opt-Out*

In the ordinary civil case, due process demands, at a minimum, that notice and an opportunity to be heard must be provided to any party whose liberty or property interests may be adversely affected by the proceeding. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 484-86, 108 S. Ct. 1340, 1344-45, 99 L. Ed. 2d 565 (1988); *Peralta v. Heights Medical Center*, 485 U.S. 80, 84-85, 108 S. Ct. 896, 899, 99 L. Ed. 2d 75 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The Supreme Court has repeatedly emphasized that such notice must be provided by a means and in a form "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Pope*, 485 U.S. at 484, 108 S. Ct. at 1344, *quoting Mullane*, 339 U.S. at 314, 70 S. Ct. at 657.[43] This requirement applies equally to defendants, *see Peralta*, 485 U.S. at 81-85, 108 S. Ct. at 897-99, as well as to parties who may be characterized as potential plaintiffs. *See Pope*, 485 U.S. at 484-85, 108 S. Ct. at 1344-45 (creditor with claims against an estate as to probate proceeding); *Adams*, 462 U.S. at 792-95, 103 S. Ct. at 2708-09 (mortgagee of real property as to sale of mortgaged property for nonpayment of taxes); *Mullane*, 339 U.S. at 307-09, 70 S. Ct. at 654-55 (beneficiaries of common trust fund as to judicial settlement of accounts by trustee).[44] Any party who is not pro-

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[43] For parties whose identity is known or "reasonably ascertainable," this ordinarily means individual notice by mail. *Pope*, 485 U.S. at 489, 108 S. Ct. at 1347. Notice by publication will usually be sufficient for others whose names or addresses cannot be uncovered by reasonably diligent efforts. *Id. Accord Mullane*, 339 U.S. at 315-319, 70 S. Ct. at 658-59.

[44] Although each of these cases involved parties with monetary claims, the Supreme Court has, in a different context, recognized that an individual's cause of action for non-monetary relief also constitutes a form of property protected by the due process clause. *See Logan v. Zimmerman Brush*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).

vided with such notice of a proceeding and an opportunity to be heard will not be bound by a judgment that results from the proceeding.[45] *See Peralta*, 485 U.S. at 85-86, 108 S. Ct. at 899-900; *Adams*, 462 U.S. at 800, 103 S. Ct. at 2712. Thus a defendant who was denied due process may avoid being subject to damages or other coercive relief ordered in a judgment, and a potential plaintiff whose rights to notice and an opportunity to be heard were similarly abridged will be free to litigate in a later proceeding issues that were decided adversely to him, or that could have been but were not presented, in the earlier suit.

One long-recognized exception to these principles is that a judgment in a class action may bind members of the class who did not receive the kind of notice and opportunity to be heard as would be required to render them "parties" to the suit in the traditional sense, provided that their interests were adequately represented. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 105 S. Ct. 2965, 2973, 86 L. Ed. 2d 628 (1985); *Hansberry v. Lee*, 311 U.S. 32, 43, 61 S. Ct. 115, 118-19, 85 L. Ed. 22 (1940). *See also* H. Newburg, 3 Newburg on Class Actions, § 13.41, at 81-82 (1985). Although this exception is firmly established, its parameters are not; both before and after the 1966 amendments to Rule 23 which vitalized the class-action device, the doctrine on the preclusive effect of class-action judgments has been uncertain and changing, principally because of the very difficulty raised by the Rule 60(b)(4) motion now before the court: that of determining the exact extent to which due process permits the representation of an absent member's interests in a particular class suit to substitute for actual notice and an opportunity to be heard. After close scrutiny of the case law in this area, and careful consideration, the court concludes that the guiding standard is one recognized by the drafters of the present version of Rule 23: "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need

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[45] Indeed, this general rule has a relatively ancient lineage. *See Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877).

for notice to the class will tend toward a minimum." Federal Rule of Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment. Applying this test to movants' three challenges to the proceedings that culminated in the settlement in *Battle*, the court further concludes that, even accepting the factual allegations of the Taylors' children and Mrs. Elrod as true, the notice provided by the court prior to the 1977 final judgment was sufficient, under the due-process clause, to bar them from relitigating their oversale and "actual vault" claims.

The notice rules contained in Rule 23, established to guide courts in protecting the due-process rights of absent plaintiffs and affording the maximum possible preclusive effect to class judgments, see Federal Rule of Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment; *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1101 n. 14 (5th Cir. 1977), are premised on this notion that the less the interests of individual members coincide with those of other members or the representatives, the greater will be the class notice demanded by due process.[46] Thus in addition to uniformly requiring a certain threshold degree of identity among the claims of the representatives and absent members and insisting that the named parties and class counsel "fairly and adequately protect the interests of the class," Rule 23 applies different notice requirements to different kinds of cases and even to different phases of the same case, depending upon the characteristic degree of unity or cohesiveness among the plaintiffs. First, in class suits of a type in which the interests of the named plaintiffs and the various absent members would be unlikely to diverge — the most prevalent being those maintained under Rule 23(b)(2), where the defendant has acted "on grounds generally applicable to the class" and the main focus of the suit is injunctive

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[46] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the court adopted as binding precedent all of the decisions of the Former Fifth Circuit handed down prior to the close of business on September 30, 1981.

or declaratory relief "with respect to the class as a whole" — Rule 23 vests district courts with discretion as to whether to provide notice of the litigation to the class and, if so, by what means. See Rule 23(d)(2) (court may require, "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action"); *Johnson v. General Motors*, 598 F.2d 432, 436-37 (5th Cir. 1979); *In re Temple*, 851 F.2d 1269, 1272 n.5 (11th Cir. 1988). *See also Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987); *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987). Second, because the settlement process even in a Rule 23(b)(2) class action is more susceptible than adversarial adjudications to abuse by the representatives to the disadvantage of the class, Rule 23(e) mandates that some form of notice of a class settlement in such a case be afforded to absent members before the settlement is approved by the district court. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S. Ct. 1773, 72 L. Ed. 2d 177 (1982). Third and finally, in that category of class suits in which "the interests of the individuals in pursuing their own litigations" may be particularly "strong" — where the plaintiff class is certified under the less stringent standard of Rule 23(b)(3) on the basis that questions of law or fact "common" to the members "predominate" over questions affecting only individual members — Rule 23(c)(2) mandates that, as with parties to non-class suits, absent plaintiffs without exception be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[47] Federal Rule of

[47] Absent members who are not identified and cannot be located through diligent efforts, or persons whose interests in the suit are merely conjectural,

Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-178 & n.14, 94 S. Ct. 2140, 2152 & n.14, 40 L. Ed. 2d 732 (1974). Furthermore, Rule 23(c)(2) also demands that class members in such a case be afforded and informed that they have a right to "opt out" — to exclude themselves from the class and the lawsuit. *Id.*; Federal Rule of Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment.

That the true measure of the notice required by due process is the cohesiveness or unity of the class is demonstrated even more clearly by the analysis employed by courts confronted with a challenge by a class member to the preclusive effect of a class judgment in a case certified as a Rule 23(b)(2) action. The law in this circuit is that such claims cannot be resolved simply by determining whether the action as a whole was properly maintained under Rule 23(b)(2) — and therefore notice was discretionary with the court — or should instead have been certified as Rule 23(b)(3) actions with notice provided as required by Rule 23(c)(2).[48] Rather,

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need not be provided with individual notice — for example, mail notice — in order to be bound. *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 168-69 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695 (1988). Furthermore, plaintiffs who are in fact provided with appropriate notice need not actually receive it in order to be bound. *See* C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure, § 1789, at 253, 255-56 (2d ed. 1986).

[48] Both movants and Liberty National have dwelled extensively in their briefs on the issue of whether the court erred in certifying the policyholder class under (b)(2) rather than (b)(3). Each side has dissected the various claims presented in *Battle*, seeking to show whether the policyholder action was "exclusively" or "predominately" one for declaratory and injunctive relief, or for monetary relief. *See* Federal Rule of Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment. *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 n. 3, 105 S. Ct. 2965, 2974, 86 L. Ed. 2d 628 (1985). The "predominance" test is rather subjective, difficult to apply, and ultimately a matter which it is "counterproductive for the court to expend time" trying to resolve. *See* H. Newburg, 1 Newburg on Class Actions, § 4.14, at 299 (1988). More importantly, it is only a rough or "wholesale"

the due-process inquiry focuses more specifically on the substantive claim or request for relief that the absent member now seeks to litigate or relitigate; if it involves individual, usually monetary, relief, then it will not be barred unless he was provided with notice and a chance to opt-out of the prior proceedings. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983) (notice required to preclude absent member in employment discrimination class action from subsequently asserting individual back-pay claim); *Johnson v. General Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979) (same). However, such notice and opt-out rights are not required with respect to initial proceedings on pattern-and-practice liability or on injunctive or declaratory relief; thus a plaintiff will be barred from relitigating these issues even though he was afforded no notice or chance to exclude himself from the class. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S. Ct. 274, 93 L. Ed. 2d 250 (1986).

The special treatment accorded back-pay claims in *Holmes* and *Johnson* turned on the heterogeneity and lack of cohesiveness among the class members with respect to such

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version of the same cohesiveness inquiry which, as described below, is customarily employed in this circuit more particularly on a claim-by-claim basis rather than to a lawsuit in its entirety.

It is important to note, however, that when a class is actually certified under Rule 23(b)(3), the strict notice requirements of Rule 23(c)(2) must be followed, without regard to whether they exceed the demands of due process; in other words, even where a Rule 23(b)(3) class possesses a high degree of cohesiveness and is more than adequately represented by the named parties and their counsel, a failure to provide notice as set forth in Rule 23(c)(2) constitutes reversible error. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 & n. 14, 94 S. Ct. 2140, 2152 & n.14, 40 L. Ed. 2d 732 (1974) (rejecting arguments that "adequate representation, rather than notice . . . satisfies Rule 23" in action maintained under subdivision (b)(3); "quite apart from what due process may require . . . Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort"). *See also In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure, § 1789, at 251 (2d ed. 1986).

claims. Requests for equitable relief normally involve "class claims, claims resting on the same grounds and applying more or less equally to all members of the class." *Holmes*, 706 F.2d at 1155 (emphasis in original). Thus in such proceedings, the "substantial cohesion of [the class members'] interests makes it likely that representative members can adequately represent the interests of absent members and that the need for an interest in individual representation will be minimal."[49] *Id.* at 1155 n. 8, quoting Note, Notice in Rule 23(b)(2) Class Actions for Monetary Relief: *Johnson v. General Motors Corp.*, 128 U. Pa. L. Rev. 1236, 1252-53 (1980). *Accord Johnson*, 598 F.2d at 437 (notice discretionary in equitable relief phase of (b)(2) case because "plaintiff group" likely to be "cohesive" and thus "the due process interests of absent members will usually be safe-guarded by adequate representation alone"). In contrast, requests for back pay, not necessarily because they involve monetary relief but because they are "atypical" and "directly related to the disparate merits of individual claims [rather than] generally applicable to the claims of the class as a whole," are more likely to give rise to "heterogeneous" classes "pregnant with potential tensions and interest-antagonisms between class members." *Holmes*, 706 F.2d at 1154-57. Indeed, the court in *Holmes* specifically relied on the divergent character of the back-pay claims in that case, noting that the lawsuit "involves a relatively small lump sum fund that must be divided among a relatively large class," and thus concluding that "allocation of this fund is a zero sum situation; a gain to one party entails a corresponding loss for the other parties." *Id.* at 1160. The court took care to distinguish such a situation from a "back pay class in which all

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[49] "Members who were not notified or given an opportunity to exclude themselves from the class were in no way deprived of due process since their claims rested on precisely the same grounds as all the other members and all the issues they would or could have raised were, in fact, adjudicated in the context of the class. Too, their relief, if any — since it was of an injunctive nature — was also intended to be identical: a halt to the alleged wrongful actions or policies." *Holmes*, 706 F.2d at 1157.

members are affected equally by a settlement," which, the court observed, "would, of course, be sufficiently homogeneous to obviate any need for an opt out protection."[50] *Id.* at 1158. *See* Federal Rule of Civil Procedure 23, Supplementary Note of Advisory Committee on 1966 Amendment (observing that "subdivision (b)(2) is not limited to civil rights cases. Thus an action looking to specific . . . relief could be brought by a numerous class of purchasers . . . against a seller" who sold goods to them at an illegal "pricing differential"). *See also Scott v. City of Anniston, Ala.*, 682 F.2d 1353, 1358 (11th Cir. 1982). For these reasons, in *Holmes* and *Johnson*, both of which, like *Battle*, involved class settlements, the court concluded that "due process required individual notice" and the right to opt-out "before the pecuniary claims of absent class members could be barred, even though the case had been certified under (b)(2)." *Holmes*, 706 F.2d at 1157. *Accord Johnson*, 598 F.2d at 438.[51]

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[50] Conversely, it is conceivable that certain equitable remedies, such as restitution, are sufficiently individual rather than class in nature as to present the same likelihood of divergent interests and thus the same need for heightened notice, as requests for individual, legal relief. *See* A. Miller & D. Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 27 (1986); H. Newburg, 1 Newburg on Class Actions, § 4.15, at 301 (1985). *See also* Recent Decisions, "A Second Bite at the Apple: Collateral Attack and Due Process in *Taylor v. Liberty National Life Insurance Co.*," 36 Ala. L.R. 1123 (1985) ("money damages or property rights alone insufficiently warrant mandatory notification; only differing claims among the members of the class should create this requirement . . . . predominantly individual claims merit more stringent notice requirements, but predominantly group claims do not").

[51] The Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), arguably raises some question as to whether Rule 23(b)(3)-type notice requirements apply as a matter of due process to class action claims for money judgments, regardless of class cohesiveness. *Shutts* involved a Kansas state court class action brought on behalf of approximately 28,000 owners of royalty rights to natural gas leases used by the defendant petroleum company. Plaintiffs sued to recover interest on royalty payments which had been delayed by the defendant. The average claim of each owner was $100. The central issue in the case appears to have been the appropriate rate to be used to calculate interest on sus-

Thus, with regard to the Rule 60(b)(4) motion now before the court, the court must examine how cohesive was the policyholder class in *Battle* in order to determine the kind and degree of notice to which due process entitled the absent members. As *Holmes* and *Johnson* instruct through their focus on the specific back-pay claims raised by absent members in those cases, the court need not ultimately address here whether the final judgment in *Battle* is void in the abstract or its entirety, nor must it determine the complete extent of that judgment's preclusive effect on the Taylors' children and Mrs. Elrod. Rather, the only matter squarely and properly presented by the Rule 60(b)(4) motion now before the court is whether the 1977 final judgment bars movants from relitigating state law claims concerning, one, their rights as casket policyholders — or heirs of such policyholders — in the event of an oversale, and, two, in the case of one of the Taylor children, her right as a vault policyholder to receive an actual vault. Movants have offered no indication that they

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pended payments. The Supreme Court, ignoring the issue of the class's apparent cohesiveness, found that the royalty holders challenging a judgment in the case had been afforded due process because the trial court had provided absent members with individual notice and opt-out rights. The court defined the kind and degree of notice mandated by due process by categorizing the case as one "wholly or predominately for money damages," rather than for "equitable relief." *Id.* at 811 & n. 3, 105 S. Ct. at 2974 & n. 3.

A close reading of *Shutts* and of subsequent cases and commentaries on it, however, convinces this court that it is essentially distinguishable from *Battle*. First, *Shutts* involved a challenge to the Kansas court's judgment brought by absent plaintiffs who were citizens of foreign states. Their argument and the court's analysis focused principally on the extent to which such class members may be analogized to out-of-state defendants who are afforded heightened due-process protection by the "minimum contacts" requirement. *See id.* at 806-14, 105 S. Ct. at 2971-76. Thus it is reasonable to view the particular due-process analysis in *Shutts* as limited to the situation of the out-of-state class member. *See* A. Miller & D. Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 27 (1986) (characterizing *Shutts* as "a case concerned with the evils of distant forum abuse," with the right to opt-out essential to preserve out-of-state class member's prerogative not to be part of lawsuit if member or her action lacks sufficient contacts with the forum). *See also In re Real Estate Title & Settlement*

wish to litigate the anti-trust claims or any other claims that were advanced or could have been advanced by policyholders in *Battle*. Accordingly, the court will not render an advisory opinion about whether the final judgment's disposition of these matters violated movants' due-process rights.

After close examination of the factual and legal nature of the oversale and "actual vault" issues resolved by the *Battle* settlement — and raised again in movants' state-court suits — the court is convinced that the interests of the absent policyholders in that case, both with respect to each other and the named plaintiffs, were extremely cohesive. As detailed in section I(A) of this order, all the Liberty National casket policies held by class members were virtually identical in their terms and conditions, the only distinctions being between the wooden casket policies and the more expensive metal casket ones, and between paid-up policyholders and those who were continuing to make payments on their burial insurance. Furthermore, the overwhelming majority of funerals covered by

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Service Antitrust Litigation, 869 F.2d 760, 765-69 (3rd Cir. 1989) (conceiving notice requirements elaborated in *Shutts* as translation of minimum-contacts standard for personal jurisdiction over out-of-state defendants into context of class action involving out-of-state absent plaintiffs).

Second, this court also believes that the reference in *Shutts* to the right afforded absent members in that case to opt-out of the class was intended to indicate not that such a measure was *required* by due process, but rather that it together with the other aspects of the notice provided by the Kansas court was constitutionally *sufficient*. Indeed, such a limited holding was all that was necessary to resolve the central argument presented to the court by the absent plaintiffs' challenge, namely, that out-of-state class members could not be bound by a judgment unless they had opted-*in* to the lawsuit. C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure, § 1789, at 255 (2d ed. 1986) ("The problem is that *Shutts* itself was a picture-perfect case, meeting all of [the discussed] requisites. The court did not have to confront the question whether all [these requisites] necessarily had to be present in order to allow a binding judgment"). *See also In re Asbestos School Litigation*, 620 F. Supp. 873, 876 (E.D. Pa. 1985) (refusing to afford opt-out rights to members of punitive damage class; despite reference in *Shutts* to "money judgments" and fact punitive damages involve legal relief, such damages are "more similar to equitable relief"), *rev'd on other grounds*, 789 F.2d 996, 1005 (3rd Cir.), *vacated*, 791 F.2d 920 (1986).

such insurance involved oversales.[52] It is true that the practical effect of the oversale provision of the settlement on policyholders and their heirs was to be monetary in nature, in the sense that it would determine the actual dollar value of the policy in the event of an oversale, and thus the money owed to the funeral director for a particular combination of funeral merchandise and services. However, at the time of the settlement, the agreement to allow an oversale credit for the face value of a casket policy — or for that matter, any uniform, across-the-board solution to the oversale dispute — did not discernibly affect one policyholder differently from another. None of the plaintiffs' claims was characterized by any special or unique factual or legal twists. Each member of the class shared an equal interest in obtaining maximum oversale rights: ideally, the more valuable package of rights claimed by movants, a casket credit coupled with free provision of the services guaranteed in the policy, but in any event certainly more than the zero credit that the funeral directors and Liberty National were prepared to argue was proper under the language of the policies. Although the settlement was, like any, a compromise between these extremes, it was in no sense — nor could it have been, given the common nature of the oversale issue — a trade-off of the interests or preferences of some plaintiffs against those of others. Thus understood, the oversale issue in *Battle* resembled the claims for injunctive or declaratory relief in *Holmes* and *Johnson* rather than the individual back-pay claims in those cases. Each policyholder's oversale claim was identical in *Battle*, in contrast to the differing amounts of money involved in the various employees' back-pay claims in *Holmes* and *Johnson*.

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[52] It is worth noting that because the settlement affected the rights of policyholders still living — in other words, those whose heirs had not yet exercised the policyholder's rights — there was no rigid demarcation between those whose funerals would or would not involve oversales. Rather, it is reasonable to assume that, at the time of the settlement, all policyholders would have expected that their heirs might purchase a more expensive casket or services than those provided in the policy, and, therefore, that their policies could be affected by the oversale provisions of the settlement.

Also importantly, back-pay claims, if settled, normally involve allocation of a fund which results in a "a zero sum situation" where "a gain to one party entails a corresponding loss for other parties." *Holmes*, 706 F.2d at 1160. On the other hand, the oversale issue in *Battle*, from the start, lent itself to a uniform settlement according to which the various policyholder's oversale rights could be governed by the same rule, rather than fixed at different monetary levels; in other words, "relief with respect to the class as a whole" was "appropriate" in the case of the oversale issue. Federal Rule of Civil Procedure 23(b)(2).

This same kind and degree of cohesiveness characterized the vault policyholders interests with respect to the "actual vault" issue resolved in *Battle*.[53] Each insured's claim was identical, and any relief granted in the way of reforming the policyholders' rights would inevitably have involved class relief, affecting the absent members generally rather than as individuals.

For these reasons, the court concludes that the burial policyholders were not entitled under the due process clause to Rule 23(b)(3)-type notice — individual notice and the right to opt-out. The court need not determine, however, that no notice at all would have been constitutionally adequate in these circumstances. Suffice it to say that the notice provided by the court in 1977 — individual notice to policyholders still making payments and certain "media" notice in the Birmingham area[54] — was enough to subsequently bind this 23(b)(2)-

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[53] Movants do not suggest any conflict of interest between the casket and vault policyholders. Most of those who held vault insurance had also purchased a supplementary casket policy so as to entitle them to funeral services. *See* section I(A). Moreover, according to movants, both groups of insured suffered unfairly as a result of the settlement in *Battle*.

[54] *See* C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure, § 1786, at 208 (2d ed. 1986) (noting that several courts have suggested that Rule 23 "does not require publication to be accomplished through formal newspaper advertisements . . . [and that in those cases] the attention given the action by the news media provided adequate notice" for purposes of Rule 23).

type plaintiff class as to any oversale or "actual vault" claims, consistent with due process. *See Johnson*, 598 F.2d at 436-37; *Bogard v. Cook*, 586 F.2d 399, 408 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S. Ct. 173, 62 L. Ed. 2d 113 (1979); *Fontana*, 826 F.2d at 732; J. Moore, 3B Moore's Federal Practice, ¶ 23.55, at 23-417 (2d ed. 1990). Because such notice was appropriately designed not to afford absent members the chance to exclude themselves from the class, but rather to inform them of the pendency of the action and permit them to challenge the representation by the named plaintiffs and class counsel or to otherwise intervene, the fact that paid-up policyholders did not receive notice did not frustrate this purpose. *See* Federal Rule of Civil Procedure 23(d)(2). Because such policyholders shared the same interests as those who did receive notice, the latter could adequately speak for them vis-a-vis the named plaintiffs and class counsel. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 168-69 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695 (1988).

Had the *Battle* litigation proceeded to trial and the challenged final judgment been the result of such an adversarial proceeding, the court could at this point conclude its analysis of movants' due-process contentions. However, the fact that the 1977 judgment emerged from a settlement among the parties triggered another notice prerequisite under the due process clause, different from the notice constitutionally required to inform an absent class, however cohesive, of the pendency of an action: the obligation of the court to insure that class members receive notice of and the right to object to the settlement. The Taylors' children and Mrs. Elrod claim that the notice provided prior to the court's approval of the 1977 settlement was constitutionally inadequate, both in its scope, because of the failure to direct notice to paid-up policyholders, and in its content, because it was misleading and incomplete.[55] The court now turns its attention to these issues.

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[55] Movants do not challenge the process by which the court entertained objections from those class members who had received notice of the settle-

ii. *Notice of the Settlement and the Right to Object*

As the court explained previously, settlement represents one of the three categories of class action "situations" in which Rule 23 provides for notice to the class. The nature and degree of notice required by Rule 23(e) and due process — which the court assumes are identical for the purposes of this case — is calibrated to the degree of disunity and divergent interests that is presumed to attend class settlements, and the accompanying risk that the named plaintiffs and class counsel may compromise the interests of the class in arriving at a settlement that serves their own purposes. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981). *See also* M. Weber, Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions, 21 U. Mich. J. L. Reform 347, 388-39 (1988). Because this divergence of interests and risk of unfairness lies somewhere between that associated generally with the litigation of suits involving, on the one hand, cohesive classes, and on the other, classes characterized by individual, distinct interests, the notice required in the event of settlement similarly is more certain than the discretionary notice allowed in Rule 23(b)(2)-type situations, but less extensive than that afforded in Rule 23(b)(3)-type circumstances — the best practicable individual notice coupled with opt-out rights.

Accordingly, Rule 23(e) states that "[a] class action shall not be dismissed or compromised without the approval of the

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ment, and considered those objections. Furthermore, although movants are critical of the court's certification of the policyholders as a temporary settlement class — in other words, its decision to approve tentatively the proposed settlement at the same tee it certified the class, in contrast to the customary course of events in which certification precedes settlement — the court does not treat this as an independent basis for their attack on the settlement. Temporary settlement classes are not prohibited either by Rule 23 or the constitution, although commentators and courts are divided as to their appropriateness. *See* H. Newburg, 2 Newburg on Class Actions, § 11.27, at 425-432 (2d ed. 1985).

court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." It is well established, as the closing words of this section suggest, that a district court has great discretion in determining the kind of notice to employ in alerting class members to a proposed settlement and settlement hearing, subject to "the broad reasonableness standards imposed by due process." *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979). *See also Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985); *Mendoza v. Tucson School Dist. No. 1*, 623 F.2d 1338, 1350-51 (9th Cir. 1980). More specifically, a court is not required to provide individual notice of a proposed settlement to the class members. *Franks v. Kroger Co.*, 649 F.2d 1216, 1222-23 (6th Cir. 1981), *vacated on reh'g on other grounds*, 670 F.2d 671 (1982).

Prior to the 1977 settlement hearing in *Battle*, the court provided for Liberty National agents to deliver individual written notice to, what movants do not deny was, at the very least, a substantial majority of the policyholder class. Moreover, newspaper and television coverage of the settlement served to alert other absent plaintiffs to its provisions and the upcoming fairness hearing. The court received numerous questions and complaints, both in writing and orally from policyholders attending the hearing. Some of these objections touched on the oversale provisions of the settlement, and many more were directed to the alteration in the rights of vault policyholders. These facts persuade the court that the notice of the settlement provided by the court in 1977 amply accomplished the purposes for which due process requires such notice, namely, to "assure that before settlements receive judicial approval the court be well-informed of the views of those who feel that they are being called upon to make the sacrifices. Only by being so informed can the court be certain that the settlement does not compromise the legal rights of class members without their consent. Such a compromise is a violation of due process." *Mandujano v. Basic Vegetable Products*, 541 F.2d 832, 835 (9th Cir. 1976). *See also Simer*, 661 F.2d at 664. Movants quote language from

Mandujano suggesting that it violates Rule 23(e) and due process "systematically [to] leave an identifiable group without notice." However, a close reading of Mandujano makes clear that the kind and degree of settlement notice demanded by the court in that case reflected the degree of cohesiveness within the class, a principle that has guided this court's review of the settlement notice in *Battle*. In referring to "an identifiable group," the Ninth Circuit explained that the failure of a substantial majority of the absent members to receive notice of the settlement was problematic because the interests of seasonal migratory workers, one of the groups who received virtually no notice, conflicted with those of other members of the plaintiff class. *Mandujano*, 541 F.2d at 837. In contrast, the interests of those class members in *Battle* who did receive notice of the settlement were essentially identical to the interests of the paid-up policyholders who were not alerted to the settlement — at least as to the oversale and "actual vault" provisions — and the former raised just the sort of questions and objections that the latter would have raised and, in the case of the Taylors' children and Mrs. Elrod, have in fact attempted to present in their state court lawsuits. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 168-69 (2nd Cir. 1987) ("the interests of all of the plaintiffs are identical . . . with regard to the facts and the law relevant to the military contractor defense. The class members with actual notice therefore would have represented the interests of the class members unaware of the action").

Beyond alleging that dissemination of the *Battle* settlement notice was not sufficiently widespread, movants also challenge the content of the notice delivered to the policyholders, on the basis that it was misleading and incomplete as to both the oversale and "actual vault" provisions of the settlement, and for this reason violated due process. The court disagrees. A class settlement notice need only properly identify the plaintiff class and generally describe the terms of the settlement so as to alert members "with adverse viewpoints to investigate and to come forward and be heard." *Mendoza*, 623 F.2d at

1352. *See In re South Florida Waste Disposal Antitrust Litigation*, 896 F.2d 493, 495 (11th Cir. 1990) (per curiam); *Burns v. Elrod*, 757 F.2d 151, 155 (7th Cir. 1985). The notice is "not required to provide a complete source of settlement information." *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977). *See also Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974). It is true, as movants argue, that the notice's explanation of the oversale provision of the settlement is far from a model of clarity and that the notice would have been more informative had it discussed the significance of this and the "actual vault" portions of the settlement. However, it is impossible to say that such explanations were so sketchy or misleading as to violate the due-process rights of absent class members.[56]

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[56] The *Battle* litigation and settlement was sufficiently complex that it would have been impossible for counsel and the court to produce a perfectly informative class notice. Indeed, class notices written by lawyers have in many cases proven incomprehensible to average citizens. For example, when the Attorney General of North Carolina sent out extensive class notices in a case brought on behalf of users of tetracycline, he received many confused responses including the following:

> Dear Mr. Clerk: I have your notice that I owe you $300 for selling drugs. I have never sold any drugs, especially those you have listed; but I have sold a little whiskey once in a while.
>
> Dear Sir: I received this paper from you. I guess I really don't understand it, but if I have been given one of those drugs, nobody told me why. If it means what I think it does, I have not been with a man in nine years.
>
> Dear Sir: I received your pamphlet on drugs, which I think will be of great value to me in the future. I am unable to attend your class, however.
>
> Dear Mr. Attorney General: I am sorry to say this, but you have the wrong John Doe, because in 1954, I wasn't but three years old and didn't even have a name. Mother named me when I got my driver's license. Up to then, they just called me Baby Doe.

A. Miller & D. Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 22 & n.162 (1986).

III.

Had this judge made the initial decision to provide notice to the policyholder class, he might well have exercised his discretion to order more extensive notice. Movants, like the Alabama Supreme Court in *Taylor*, may also be correct in pointing to the unfairness of the settlement's oversale and "actual vault" provisions to policyholders. However, movants' rights at this point with respect to the settlement, and the scope of this court's review, are limited to relief only from those errors which rose to the level of a due-process violation. Because the court finds no such violation, even accepting the allegations by the Taylors' children and Mrs. Elrod as true, the court concludes that their Rule 60(b)(4) motion is due to be denied. In closing, the court observes that however substantively disadvantageous the settlement may have been to these movants, there are substantial equities which at this late date fall on the other side of the equation. This court correctly noted in its 1987 injunction order that a complex judgment, constructed after extensive litigation, materially affecting the rights of millions of individuals, and on which all the parties have substantially relied for fourteen years, "should not lightly be torn down." *Battle v. Liberty Nat. Life Ins. Co.*, 660 F. Supp. 1449, 1452 (N.D. Ala. 1987) (Hancock, J.). Whatever the shortcomings of the notice provided to policyholders by the court in 1977, they are insufficient to justify relief under the constitutional wrecking ball of Rule 60(b)(4).

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court that the objection filed by defendant Liberty National Life Insurance Company on March 28, 1990, is sustained and the motion to strike filed by plaintiffs Aubrey Carr and Carr Services Enterprises, Inc., on April 3, 1990, is granted to the extent that the motion pursuant to Rule 60(b), filed by plaintiff-intervenors James L. Taylor, Francis Taylor Spence, Deborah Taylor, Diane Taylor Stafford, Philip Taylor, Gretta Taylor, and Annie J. Elrod on February 26, 1990, be and it is hereby denied.

It is further ORDERED that costs associated with said Rule 60(b) motion be and they are hereby taxed against the plaintiff-intervenors, for which execution may issue.

DONE, this the 6 day of August, 1991.

/s/ Myron Thompson

UNITED STATES DISTRICT JUDGE

APPENDIX C

James L. Taylor, as the Administrator of the Estates of
James Jackson Taylor & Laura F. Taylor, Deceased;
James L. Taylor, Frances Louise Taylor Spence,
Deborah Taylor, Diane Taylor Staff,
Phillip Taylor and Gretta Taylor

v.

Liberty National Life Insurance Company, a Corp.;
Aubrey Carr, d/b/a Carr-McConnell Funeral Home;
Carr-McConnell Funeral Home, Inc., a Corp.;
and Carr Service Enterprises, Inc.,
a Corporation

No. 83-172

Supreme Court of Alabama

462 So. 2d 907

November 21, 1984

Before Faulkner, Jones, Almon, and Embry, JJ., concur. Maddox and Beatty, JJ., dissent. Torbert, C.J., and Shores and Adams, JJ., recuse themselves.

PER CURIAM.*

This is a due process of law case. We must resolve this constitutional issue to determine the res judicata effect of a prior judgment, which included a finding that the requisites of due process had been met. Plaintiff contend that they were denied due process in a class action suit in federal district court. Defendants respond that Plaintiffs are precluded from raising the due process question by virtue of the federal court's prior determination. The trial court granted Defen-

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* Because of three recusals, this decision is by a majority of four of six justices sitting. *See* § 12-2-14, Code 1975.

dants' summary judgment motions based on their res judicata argument.

We conclude that this Court may review the due process determination of the federal court. Further, we find that the instant Plaintiffs' deceased insureds did not receive the process that was their due. Accordingly, we reverse the trial court's summary judgment as to the contract claims. We affirm as to the remaining claims.

HISTORY OF THE CASE

I. *The Prior Federal Court Action*

The United States District Court for the Northern District of Alabama on January 6, 1978, entered a final judgment in *Battle v. Liberty National Life Ins. Co.*, Civil Action No. 70-H-752-S. *Battle* was a consolidated case, filed against Liberty National and Brown Service Funeral Homes Co., Inc.,[57] on behalf of certain funeral directors in Alabama and certain insureds under burial and vault policies of those companies. The consolidated actions asserted, in essence, claims against Liberty National and Brown Service for violations of federal anti-trust laws and the McCarran-Ferguson Act and for fraud and deceit.[58]

II. *The Instant Case*

The controversy in this case involves the funerals of James Jackson Taylor and his wife, Laura F. Taylor. In 1938, Mrs. Taylor purchased a Liberty National burial policy, which provided the following benefits:

"(A) [A] a casket of the retail value of $250.00 . . .;

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[57] Brown Service provided funeral services and merchandise for the performance of burial insurance policies issued or assumed by Liberty National.

[58] See *Battle v. Liberty National Life Ins. Co.*, 493 F. 2d 39 (5th Cir. 1974), for a background discussion of this class action litigation.

"(B) A place where funeral, memorial, or other services may be held and such assistance as is proper in conducting the funeral; such services to be conducted either at the church, funeral parlor, home of the deceased, or other place designated by the beneficiary or other person having the authority;

"(C) Embalming of body, suit or dress and hearse service for the body to the cemetery. . . ."

In 1955, Mrs. Taylor purchased a supplemental burial policy to provide a $500 metal casket for her funeral, in lieu of the casket furnished by the first policy.

Mr. Taylor purchased his burial policy in 1946 and a supplemental burial policy in 1955. The terms of his policies were the same as those of his wife's policies. Mr. Taylor died on February 24, 1982, and Mrs. Taylor died on February 3, 1983.

The trial court's order included the following:

". . . Mr. and Mrs. Taylor at the times of their respective deaths were insured under burial insurance policies issued or assumed by Liberty National. Representatives of their family called Carr-McConnell Funeral Home of Athens, an authorized funeral director of Liberty National-Brown-Service, to pick up the bodies and turned over to Carr-McConnell the funeral policies in effect on the life of the deceased and made funeral arrangements with Carr-McConnell. The family on each occasion decided not to use the casket furnished under the burial policies and selected and bought from Carr-McConnell a 'better' or more expensive casket. When this occurs this is what is known in the funeral director industry as an 'oversale.' Carr-McConnell, in the case of each funeral, made a charge for the more expensive casket and also made a charge in Mr. Taylor's funeral for 'Services: Including facilities, equipment, all personal, professional and staff services. . . .'"

The charges for Mr. Taylor's funeral totaled $1,898, while the charges for Mrs. Taylor's funeral were:

> "Embalming the body, $809.00.
> Providing a place where the funeral was held, $515.00.
> Furnish transportation for the body to the cemetery, $280.00.
> Casket, $782.00.
> Burial vault, $525.00.
> Opening and closing grave, $80.00.
> Hair Dresser, $20,00
>
> TOTAL, $3011.00"

The Taylor family alleged that the caskets provided Mr. and Mrs. Taylor by the funeral home were of the same quality and price; that Mr. and Mrs. Taylor were embalmed in the same manner and location; and that the same hearse was used to carry the bodies of Mr. and Mrs. Taylor to the same cemetery.

The funeral home allowed a total credit of $600 for both of Mr. Taylor's burial policies, but only offered a total credit of $500 for both of Mrs. Taylor's policies, which the family refused to accept.

The administrator and heirs of Mr. Taylor's estate brought suit against Liberty National and Aubrey Carr, the operator of Carr-McConnell Funeral Home in Athens. Count one of the complaint sought recovery for monies due and owing on the burial policies, while count two sought recovery for misrepresentations as to the amount due and owing on the policies, and count three sought recovery from the insurer for a bad faith refusal to pay. Likewise, the administrator and heirs of Mrs. Taylor's estate brought suit against Defendants on similar grounds. The cases were consolidated for trial. Plaintiffs appeal the summary judgment granted on behalf of Defendants by the trial court.

OPINION

Plaintiffs acknowledge at the outset that if the Taylors were not denied due process in the prior proceedings, the federal class action decree rewrote the subject policies of insurance to the effect that Defendants' res judicata claim is valid and the trial court's summary judgments are due to be affirmed. That is to say, absent a due process question, Plaintiffs do not dispute the consequences which would follow from the application of the federal class action decree.

A due process question, however, is raised. Plaintiffs assert that because the Taylors received no notice — actual or constructive — of any of the *Battle* proceedings, they were denied due process and are not bound in the instant case by the prior judgment.

I. *Standard of Review*

Crucial to our consideration of the due process issue is the applicable standard of review. If, as the instant Defendants contend, the federal decree's holding is not subject to collateral attack, and thus must be given res judicata effect, out inquiry ends before it begins. Admittedly, the district court's final decree, approving the settlement agreement, explicitly found:

> "The adequacy of representation of the classes, the notice, the opportunity to participate and to be heard, meet the requirements of due process and satisfy the notice requirements of Rule 23."

If, on the other hand, as the instant Plaintiffs contend, this Court is legally authorized to review the adequacy *vel non* of the notice afforded these insureds, then the propriety of the federal judgment on which the trial court based its order is subject to our independent determination.

Under the settled law applicable to these circumstances, there is no question that this Court is empowered to review a judgment collaterally attacked on due process grounds. *See,*

generally, 3 Newberg on Class Actions, § 2755b (1977); Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 889 (1974). Indeed, the Federal Rules Advisory Committee itself states that "the court conducting the [class action] cannot predetermine the 'res judicata' effect of the judgment; this can only be tested in a subsequent action." Fed. R. Civ. P. 23, Advisory Committee's Note, 39 F.R.D. 98, 106 (1966).

The United States Supreme Court squarely addressed this issue in *Hansberry v. Lee*, 311 U.S. 32 (1940). The *Hansberry* Court held that, if the res judicata effect of the prior judgment is collaterally attacked on due process grounds, it is the duty of the reviewing court to examine the prior litigation and determine if the complainant was given constitutional notice and opportunity to be heard. *Id.* at 40. *See, also, Gonzales v. Cassidy*, 474 F. 2d 67 (5th Cir. 1973). As one federal judge turned commentator noted, "Omniscience [on the part of the court that first hears the class action] is not expected or necessary." M. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 46 (1968). Thus, we find ourselves duty bound to review the federal court's determination of the notice issue.

II. *Class Certification*

As our discussion will demonstrate, compliance with Rule 23's notice requirements does not, of itself, satisfy constitutional due process, unless the court also correctly certifies the class. Therefore, to determine if the insureds were given due process, we must first examine the federal court's certification of the policyholder class. Generally, what type notice, if any, is due in a class action depends on how the class is certified.

Fed R. Civ. P. 23 sets forth three types of class actions: 1) A 23(b)(1) action is proper in cases where the rights of individual class members would be prejudiced if the suit were brought individually or in cases in which inconsistent adjudication among the parties might result if the suit were individual rather than class; 2) a 23(b)(2) suit is limited to those

cases in which the relief requested is primarily declaratory or injunctive in nature; and 3) a 23(b)(3) suit's prerequisites are that common questions of law and fact predominate over any questions affecting only individual class members and that a class action is the fairest and most efficient method for the adjudication of the controversy. More simply, if the relief requested is predominantly monetary, the action must be brought as a 23(b)(3) suit. Fed, R. Civ. P. 23(b); Advisory Committee's Note to that rule, 39 F.R.D. 98, 102 (1966).

Notice is mandatory only in 23(b)(3) suits. Fed. R. Civ. P. 23(c)(2). In Rule 23(b)(1) and (b)(2) suits, some courts have held that notice is discretionary, but the majority rule is that no notice at all is required. *See* Note, Class Actions: Certification and Notice Requirements, 68 Geo. L.J. 1009, 1028 (1980). The reasons usually asserted for requiring notice (or more notice) in a 23(b)(3) suit and not in 23(b)(1) and (2) suits are: 1) 23(b)(1) and (b)(2) classes by their nature are more cohesive than (b)(3) classes, Fed. R. Civ. P. 23; Advisory Committee's Note to Rule 23(b), 39 F.R.D. 98, 106 (1966); and 2) 23(b)(3) suits involve the adjudication of property rights, which requires notice to afford absent class members due process. Note, Class Actions: Certification and Notice Requirements, 68 Geo. L.J. 1009, 1028 n. 161 (1980). As that law journal note concisely states:

> "When only injunctive and declaratory relief are sought in a class action, 'the due process interests of absent members will usually be safeguarded by adequate representation alone.' When individual monetary claims are at stake, however,' the balance swings in favor of some form of notice.'" *Id.* at 1029 (*quoting Johnson v. General Motors Corp.*, 598 F. 2d 432, 438 (5th Cir. 1979)).

Thus, if analyzed in terms of what the class members have at stake in the different types of class actions, the reason for the different notice requirements for the different type classes is obvious — due process itself required different notice based on what rights and obligations are at stake in each

of the three different class types. At the same time, it is obvious that a class must be correctly certified under Rule 23, or it may not command the process that is its due. Otherwise stated, mere compliance with the Rule's notice requirements for a particular type class action does not necessarily mean that due process is given, unless the class was certified correctly to begin with. Notice is not a function of class type; class type is a function of notice.

In the *Battle* case the federal district court, without explanation, certified the policyholders as a 23(b)(2) class. As previously stated, the majority of jurisdictions hold that no notice is required in 23(b)(2) suits. Therefore, according to the majority position, if the federal court's 23(b)(2) certification of the policyholder class was correct, the instant insureds were not entitled to notice.

At this point, in order to evaluate the federal court's certification determination and to fully appreciate the Plaintiffs' argument that their insureds were deprived of due process because of insufficient notice, we need to retrace, in overview, how the *Battle* settlement came about. This suit had its origin in 1970 in a justiciable controversy between the funeral directors and the insurance company, which, in turn, had its roots in the growing dissatisfaction on the part of the directors with what they perceived as a forced adhesion contract with the insurer to service the insurer's burial policies.

The policyholder class was not joined as parties plaintiff until September 22, 1977. The federal court's order of that date established the "temporary settlement class" and also set forth a "tentative" settlement agreement. Thus, at the time the policyholder class was joined, the original parties had already decided on the settlement. Indeed, the reason the "insureds under burial insurance policies of Liberty National" were denominated by the federal court orders as "members of the temporary settlement class" was that neither the insurance company nor the class of funeral directors, as between themselves, was willing to make the concessions necessary to reach an acceptable settlement agreement.

In essence, then, these initial parties agreed to settle their dispute only in the event they could effect a concession from the policyholders in the nature of substantially reduced obligations on the part of the insurance company, which, in turn, would also permit the funeral directors to charge at will for their services and merchandise, if the insured's representative chose services or products varying in any particular from those stated in the policy.

One additional factor deserves emphasis. The policyholder class, once certified, stood only to lose, and to lose substantially. At stake in this settlement, as postured at the moment of class certification, was not the slightest chance that the policyholders' interests would be affirmatively served, despite the fact that they were joined as parties plaintiff. From the policyholders' point of view, it was a "no win" situation, guaranteed by the "temporary settlement" status of the class as certified by the federal court. Put another way, just in case, by some unforeseen event, something went wrong with the settlement proposal, the surreptitiously created "temporary settlement class" of policyholders could be terminated, so as not to pose a threat to the adverse interest of the original parties.[59]

As it turned out, both the funeral directors and the insurance company won, not at the expense of each other, but

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[59] "Should it be determined by the Court that members of the classes may elect to opt out and not be bound by the terms of the Consent Judgment and should such a substantial number of the members of either class determine to opt out as to indicate substantial disagreement with the terms and provisions of such Consent Judgment, the Court shall, upon petition of the Defendants, refuse to enter such Consent Judgment." Section III D., Order Consolidating Actions, September 22, 1977, *Battle Funeral Home v. Liberty National Life Ins. Co.*, Civil Action No. 70-H-752-S.

This quoted language from the Federal Consolidation Order of September 22, 1977, is curious indeed in view of the court's later 23(b)(2) policyholder classification — a classification that does not include an "opt out" provision — and this in contradistinction to a 23(b)(3) classification for the funeral director class.

totally and completely at the expense of the policyholders. In the final analysis, then, there was no settlement, in a give and take sense, between the funeral directors on the one hand and Liberty National on the other. The settlement was between the undertakers and Liberty National on one side and the policyholders on the other.

This is not to say that the federal decree approving the "settlement agreement" did not enumerate "many advantages to the members of the policyholder class." For example, the court said that, as part of the settlement agreement, it would

> "determine the quality of the casket to be furnished in fulfillment of the obligations of Liberty National under its burial insurance policies so that policyholders will receive funerals having a retail value not less than the value stated in the policy."

What the court says it would "determine" was already an obligation fixed by the terms of the policy itself.

Another example of "advantages" cited in the federal judgment was that

> "[t]he increased payments required by the Settlement Agreement to be made to authorized funeral directors and the more objective standards of acceptability to become authorized funeral directors will also redound to the benefit of the policyholder."

Apparently, this referenced "benefit of the policyholder" consists in the court's assurance that henceforth burial merchandise and services will more nearly comport with the reasonable expectations of the policyholder, pursuant to the contractual obligations of the parties. Surely, no one could seriously contend that such "advantages" constitute a quid pro quo component of the "settlement agreement" in question. Because one is now assured that he will get certain benefits to which he was already entitled under the policy, reasons the federal decree, the court will approve a "settlement" that rewrites the policy and takes away substantial benefits to which

he was already entitled. The foregoing is indicative of the true nature of the advantages of the "settlement agreement" to the individual policyholder.

The disadvantages to the policyholder class were substantial. For example, before the settlement agreement, if a policyholder's family chose a more expensive casket, his estate was obligated, by the terms of the policy and by the practice of the industry for many years, for the difference between the stated policy value of the casket and the cost of the casket actually purchased, plus incidentals not provided by the policy, but other merchandise and services were furnished in accordance with the policy.

After the settlement agreement, however, the policies remain effective, as written, only if all the merchandise and services are accepted exactly as provided by the policy. Any change voids the policy and permits the funeral parlor to charge as it pleases for each item, allowing as a credit only the policy designated retail value of the item (even the $20 hairdresser charge for Mrs. Taylor would constitute an "oversale" and void the policy.) In the present case, the difference for Mrs. Taylor's burial expenses before and after the settlement agreement, the amount in dispute, is approximately $1600 — more than half of the total charges for her burial.

Under these circumstances, then, in what class should the instant insureds have been certified to assure them of due process? Even if the proposed settlement, in fact, had been "tentative," offering at least the potential of material, affirmative relief, when the court brought the policyholders into the *Battle* litigation, they should have had notice; and this for the reason that they stood to lose vested property rights under paid-up burial insurance policies. But at the time they were made parties to the settlement agreement, the policyholders stood only to lose, with not an outside chance of gaining even an offsetting benefit for the materially depreciated benefits otherwise assured under these burial policies. A more classic taking of property can hardly be imagined. In many cases where the taking was less onerous than in *Battle*, courts

have held that notice was due. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

To dramatize this point, we observe the obvious: The insurer, as the named defendant in the *Battle* action, obtained affirmative relief (amounting to millions of dollars) at the expense of the policyholders — relief that would have been impossible in a direct action by the insurer against the insureds for reformation of the insurance policies. In other words (and no one contends otherwise), settled principles of contract law would dictate summary judgment on behalf of the insureds in any action on the part of the insurer to alter the terms of these burial policies in the manner effected by the federal class action.

Under the facts before us, we have no difficulty in holding that these policyholders were entitled to some form of notice. Thus, because they were entitled to notice, it follows that the policyholders should have been certified as a Rule 23(b)(3) class, it being the only class type where notice must be given. To be sure, in the pleadings the alleged policyholder class requests injunctive and monetary relief ($60,000,000), which might indicate that they properly could have been certified as a 23(b)(2) injunctive type class. Yet, this request for relief formed no basis for the settlement agreement, rendering the so-called plaintiff status for the policyholders a mere facade created by the originally named parties. At that point in the proceedings, the policyholders could only lose; and, indeed, as we have seen, they did lose — and lose substantially. Therefore, the policyholders should have been certified as a 23(b)(3) class in order to avoid due process violations.

III. *Adequacy of Notice*

We now turn to the question of what notice was due to the policyholder class. The due process notice standard for a 23(b)(3) suit is set out in 23(c)(2): "[T]he court shall direct to members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The fed-

eral court found that "there is no record which sets forth the addresses of the current policyholders. Indeed, there is not even an alphabetical listing of the policyholders. The records with regard to the policies are kept by number only." Under these circumstances, the court ordered:

> "Notice to the insured policyholders class in the form attached shall be delivered by debit agents of the Defendants Liberty National Life Insurance Company be leaving a copy thereof at each place where all such agents in Alabama call upon a policyholder of the Defendant Liberty National Life Insurance Company for any purpose for a period of four consecutive weeks beginning not less than 45 days prior to the date of the hearing."

The federal court held that this home delivery notice, supplemented with "intensive and widespread media coverage" (articles published in two "leading" Birmingham daily newspapers and news programs on two "local" Birmingham television stations), constituted the best notice practicable; and, therefore, the federal court found the requisites of due process were met.

The Plaintiffs appear to argue that anything less than actual notice deprived them of due process. They state in their brief:

> "[On] the fourth page of the *Battle* consent judgment, the Court states that several articles were published in the two leading Birmingham daily newspapers and that news programs on two local television stations called attention to the hearing. Neither Mr. nor Mrs. Taylor at any time received a Birmingham newspaper and neither received programs originating from any Birmingham television station. In fact, Mr. Taylor could not read during the period of 1973 to the summer of 1980 when he had a cataract operation, and Mrs. Taylor's speech was severely impaired continuously from the time she suffered a stroke in 1975 and until her death on February 3,

> 1983. This Court may take judicial notice that Limestone County's northern border is the Tennessee state line, and the town of Athens in which the Taylors lived is located only fourteen miles south of the Tennessee border. The record fails to reflect any attempt by Liberty National to give any actual notice to the Taylors of the court proceedings in which the *Battle* consent judgment was rendered."

The court's attempt to actually notify policyholders through debit agents was doomed to failure from the start with respect to those policyholders, like the Taylors, who had paid-up policies. Presumably, the debit agents had no reason to call on these policyholders, unless, coincidentally, they were insureds under other Liberty National industrial-type policies. Thus, it is conceded that the Taylors did not have actual knowledge of the settlement agreement and the court proceedings incident thereto.

Moreover, the instant insureds, and others similarly situated, quite possibly were entitled to the best possible notice.[60] Being paid up, with vested property rights, they stood to lose more than other members of their class. But whether Rule 23(c)(2) requires actual notice, under the totality of the circumstances, we need not decide. At the very least, the instant insureds were due constructive notice, which they did not get.

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[60] Because the constitutional standard of reasonableness is measured by the nature and character of the claim asserted, the relief sought, and the resulting decree affecting the rights and obligations of the unserved class, a strong argument can be made for actual notice. Certainly, if these policyholders had been sued as defendants in a direct action for reformation of the contract of insurance (to the same extent as that here effected by the settlement decree), the rights of those insureds who did not receive personal service of process could not have been adjudicated; and this notwithstanding the insurer's claim that it did not have the policyholders' names and addresses or the means of ascertaining them. Indeed, arguably, the onesidedness of the terms of the settlement agreement, with respect to these policyholders, impugns the propriety of a Rule 23 certification of any class type.

In *Lamb v. United Security Life Co.*, 59 F.R.D. 25, 42 (S.D. Iowa 1972), the court implied that unless unidentifiable class members constitute a relatively insignificant element of the class, due process requires constructive notice before a class judgment is res judicata. We do not consider the Taylors, with their vested property rights, members of an insignificant class element. We find that some attempt at constructive notice was their due.

In order to protect unidentifiable class members and provide "the best notice practicable under the circumstances," many courts supplement actual, mailed notice to widespread class members with constructive notice by publication. *See In re Scientific Control Corp. Securities Litigation v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 80 F.R.D. 237 (S.D. N.Y. 1978); *Lamb v. United Security Life Co., supra.* No notice by publication was attempted in the instant class action.

We recognize, as did the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co., supra*, that notice by publication is inherently weak. We also acknowledge that some courts require more explicit publication notice than standard legal advertising. *See, e.g., Biechele v. Norfolk & Western Ry. Co.*, 309 F. Supp. 354 (N.D. Ohio 1969); *Berland v. Mack*, 48 F.R.D. 121, 130 (S.D. N.Y. 1969). Yet, here, although we have not approved publication as meeting the notice requirements of Rule 23, publication notice, even with all of its infirmities, would have been superior to that received by the instant insureds. Because, according to the insurer, it was impossible to actually notify paid-up policyholders, "media coverage" in Birmingham was supposed to be their "due process." We hold that routine newspaper and television "media coverage," even as to those policyholders within close proximity to its source of distribution, does not constitute constructive notice and due process for the taking of substantial property rights. The Taylors, at the very least, were entitled to some formal attempt at constructive notice in order to have the "best notice practicable under the circumstances."

Therefore, because a requisite element of the res judicata test is missing, the settlement in the federal suit does not affect the Taylors' interests in their respective policies; thus, the trial court erred in granting Defendants' motions for summary judgments as to the contract claims. As to the tort counts for misrepresentation and bad faith, we agree with the trial court that the facts and circumstances here alleged do not state claims for which relief can be granted.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Faulkner, Jones, Almon, and Embry, JJ., concur.

Maddox and Beatty, JJ., dissent.

Torbert, C.J., and Shores and Adams, JJ., recuse themselves.

DISSENT BY: MADDOX

DISSENT: MADDOX, JUSTICE (Dissenting).

The thrust of the majority opinion is that a state court can review, on collateral attack, a federal decree entered in a class action and can determine whether the notice required by the federal court complied with due process requirements. While I agree that a court conducting the class action cannot predetermine the res judicata effect of its own judgment, I believe the principles of res judicata are uniquely applicable in this case, because the federal court determined in *Battle* that the "requirements of due process" were met,[1] and in paragraph XXXIII of its decree retained jurisdiction over both the subject matter and the parties "*for the purpose of enabling any of the parties to [that] action to apply to [that] court at any time for further orders and directions as may be necessary. . . .* (Emphasis added.)

Consequently, I am of the opinion that these plaintiffs could seek the relief they here seek in the federal forum, and if still aggrieved could prosecute appeals in the federal system; therefore, I would affirm the judgment of the trial court, which held in part as follows:

> "The subject matter of the claims of the representatives of the policyholder class was based on the sale, issue and performance of the burial insurance policies issued or assumed by Liberty National. They sought to recover damages against the defendants for allegedly injuring them in the sale of funerals, funeral services, funeral merchandise and burial insurance relating thereto. The [federal district court] in *Battle* described [representatives of the policyholders] as claiming violations of the anti-trust laws and also [stated that representatives of the policyholders] had invoked the pendente lite jurisdiction of the [federal district court] in counts of misrepre-

[1] As the majority points out, the federal court found:

> "The adequacy of representation of the classes, the notice, the opportunity to participate and to be heard, meet the requirements of due process and satisfy the notice requirements of Rule 23."

> sentation and fraud with respect to burial insurance policies issued or assumed by Liberty National. Plaintiffs charged Liberty National had engaged in deceptive sales tactics in the marketing of burial insurance policies and they sought compensatory and punitive damages for the fraud and deceit allegedly practiced on them."

I can readily appreciate the concern of the plaintiffs about the adequacy of the notice in the federal proceeding, but I am not convinced completely that the notice required by the federal court did not comport with due process requirements, as that court found.

I am aware of the principle that individual notice to class members certified under subdivision (b)(3) of Rule 23, Fed. R. Civ. P., is mandatory where class members can be identified with reasonable effort, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-177 (1974); *First Alabama Bank v. Martin*, 425 So. 2d 415, 423 (Ala. 1982). I am also aware that notice in (b)(2) class actions is discretionary with the federal district court, *Johnson v. General Motors Corp.*, 498 F. 2d 432, 436 (5th Cir. 1979). A federal appeals court has written:

> "It does not follow that because notice in (b)(2) actions is not made mandatory by Rule 23, every (b)(2) action in which notice is absent will automatically bar all subsequent efforts by members of the class to litigate claims that might have been brought in the original class action. Before the bar of res judicata may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consonant with due process. *E.g.*, *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1942); *Gonzales v. Cassidy* [474 F. 2d 67 (5th Cir. 1973)]."

Id.

In its order of September 22, 1977, tentatively approving the settlement agreement and establishing temporary classes for the settlement, including a class of policyholders pursuant to Rule 23(b)(2), the federal district court in *Battle* noted:

"6. The number of members of the temporary settlement class consisting of insureds under burial insurance policies of Liberty National exceed 1 million and their names and addresses cannot be ascertained through reasonable effort.

"* * *

"8. The best notice practicable for members of the temporary settlement class composed of insureds under burial insurance policies of Liberty National and those claiming any interest therein is written notice to be delivered by agents of the Company as hereinafter provided."

"In a rule 23(b)(2) class action, mechanics of the notice process are left to the discretion of the district court subject only to the broad 'reasonableness' standards imposed by due process." *Fowler v. Birmingham News Co.*, 608 F. 2d 1055, 1059 (5th Cir. 1979).

With regard to the notice aspect of *Battle*, the federal district court made the following findings a part of its final order:

"Notice to members of the two temporary settlement classes established by the Court in its order of September 22, 1977, has been given as directed by the Court. Such notice was the best practicable to members of both temporary settlement classes and was reasonably calculated to give actual individual notice to the members. There was intensive and widespread media coverage calling attention to the terms of the Settlement Agreement and the hearing. Several articles were published in the two leading Birmingham daily newspapers having a general circulation throughout the State of Alabama. These articles called attention to the hearing, discussed the nature of the suits, and expressly stated the time and place of the hearing. News programs on two local television stations similarly called attention to the time, place and nature of the hearing. The Court is of the opinion that as a result of the notices

> and widespread media coverage approximately 90 percent of the burial and vault insurance policyholders of Liberty National in the State of Alabama received notice of the proposed settlement and of the hearing thereon. The adequacy of representation of the classes, the notice, the opportunity to participate and to be heard, meet the requirements of due process and satisfy the notice requirements of Rule 23."

Based on these findings of the federal district court the circuit court, in my opinion, was authorized to conclude that the notice provided policyholders certified under subsection (b)(2) of Rule 23 with adequate notice, and satisfied the stricter requirements of (b)(3) certifications, which requires "the best notice practicable under the circumstances." Rule 23(b)(2), Fed. R. Civ. P. Thus, I believe the trial court, in this case, could hold that the notice afforded policyholders in *Battle* was, under the circumstances of this case, where jurisdiction was retained, sufficient to comport with the requirements of due process and to make the final judgment binding on absent members of the class. *Cf. Hollman v. Pennsylvania Life Ins. Co.*, 536 F. Supp. 745 (N.D. Ala. 1982) [Plaintiff's failure to receive through the mail personal notice of a judgment in a California case settled by decree, the notice being given pursuant to Rule 23(c)(2) and 23(e), did not preclude res judicata effects]. *See* generally, 2 Newberg on Class Actions § 2755(b) (1977).

By letter brief, submitted following the argument of the instant case before this Court, appellants contend that the class action is not binding because the class members were not adequately represented. Clearly, a class member cannot be bound by a judgment in an action in which he was not adequately represented by the class representative. *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Fowler v. Birmingham News Co., supra*, 608 F. 2d at 1058. In *Gonzales v. Cassidy*, 474 F. 2d 67 (5th Cir. 1973), the court announced the following standard for determining whether the interests of a class have been adequately represented:

> "We hold that the primary criterion for determining whether the class representative has adequately represented his class for purposes of res judicata is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class. A court must view the representative's conduct of the entire litigation with this criterion as its guidepost."

Id. at 75; *see* generally 2 Newberg on Class Actions § 2755(c) (1977).

The federal district court made an express finding that the policyholder class had been actively represented by attorneys for the class in this case. I am of the opinion that, based on these findings, the circuit court could have concluded that the class representative, represented by qualified counsel, "protected the interests of the class," and that the class action in *Battle* was binding with respect to the appellants here. In short, I believe, under the particular circumstances of this case, that the trial court correctly applied the doctrine of res judicata.

The doctrine of res judicata provides that matters once adjudicated are settled and determined if: (1) the judgment in the prior action was rendered by a court of competent jurisdiction; (2) the judgment in the prior action was rendered on the merits; (3) the parties in both actions are substantially identical; and (4) the causes of action or issues are the same in both actions. *Ozley v. Guthrie*, 372 So. 2d 860, 861 (Ala. 1979); *Wheeler v. First Alabama Bank*, 364 So. 2d 1190, 1199 (Ala. 1978). When these elements are present, the former judgment is an absolute bar to any subsequent suit on the same cause of action, including any issue which was or could have been litigated in the prior action. *Ozley v. Guthrie, supra; Wheeler v. First Alabama Bank, supra.* Res judicata likewise bars the litigation of claims in state court which were heard or could have been heard in a prior class action in federal court. *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So. 2d 764, 768-69 (Ala. 1981); *Educators' Invest-*

ment Corp. v. Autrey, 383 So. 2d 536, 538-539 (Ala. 1980). In *Century 21*, I would have authorized the state court action to proceed, and I dissented there on the ground that I thought that "[n]one of the parties plaintiff presently before this Court [in the state action] was a party to the federal litigation, nor did any of these parties plaintiff participate in any manner in the federal court litigation" (emphasis in original dissent). There, this Court's action was so contrary to the result reached by the majority in the present case that it is instructive to quote substantially from the *Century 21* case, 401 So. 2d 764 at 768-70:

> "While, ordinarily, it is not this Court's function to inquire into a party's motives in his pursuit of legal remedies, we are constrained to observe that the journey of these combined federal and state litigations run[s] afoul of the nonrelitigation spirit of the res judicata and equitable estoppel doctrines. Simply stated, Appellants, though identical parties in interest, having exhausted their remedy in one forum, now seek 'another bite at the apple' in a second forum.
>
> "*Substantial Identity of Issues.*
>
> "Under both Alabama law (*Educators' Investment Corp. of Ala., Inc. v. Autrey*, 383 So. 2d 536 (Ala. 1980), and *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1199 (Ala. 1978)) and federal law *Wasoff v. American Automobile Insurance Co.*, 451 F. 2d 767, 769 (5th Cir. 1971)), the doctrine of res judicata prohibits the relitigation of all matter which was or could have been litigated in the prior action.
>
> > "This doctrine is based on the notion that [a] party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permis-

> sible.' *Baltimore Steamship Company v. Vernon Phillips*, 274 U.S. 316 [47 S.Ct. 600, 71 L.Ed. 2d 1069] (1927).

"This doctrine also 'bars state litigation on a part of the claim that could have been, but was not, heard in a federal action and it bars suit in a state court on a state law claim that, under the doctrine of pendent jurisdiction, could have been joined with a claim under federal law in the federal action.' 17 Wright & Miller, Federal Practice and Procedure, § 4226, at 343-4 (1978). *See, also, Educators' Investment Corp. of Ala., Inc. v. Autrey, supra.*

"Inherent in such substantive principles of jurisprudence is a determination, in this case by this Court, of whether or not the moving party was precluded from asserting both state and federal theories of recovery in the initial federal court proceedings. Such a determination, be it pro or con, must necessarily coincide with an analysis of pendent jurisdiction.

"Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . .,' U.S. Const., art. III, § 2; and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933).

"The state and federal claims must derive from a common nucleus of operative fact. *See Starker v. U.S.*, 602 F. 2d 1341 (9th Cir. 179). But if a plaintiff's claims, regardless of their federal or state character, are such that he would be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. *United Mine Workers of*

America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966); *cf., Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 325, 59 S.Ct. 191, 196, 83 L.Ed. 195 (1938). Note, Problems of Parallel State and Federal Remedies, 71 Harv. L. Rev., 513, 514 (1958).

"State law claims are appropriate for federal courts determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law.

> "'"[T]he whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time."' [*United Mine Workers of America v. Gibbs, supra, citing Baltimore Steamship Company v. Vernon Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927).]

"Pendent jurisdiction need not be exercised in every case in which it is found to exist. It is a doctrine of discretion, not of plaintiff's right. *United Mine Workers of America v. Gibbs, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950). *Moynahan v. Pari-Mutuel Employees Guild of California*, Local 280, 317 F. 2d 209, 211-212 (9th Cir. 1962). Its justification lies in considerations of judicial economy, convenience and fairness to litigations. Generally, absent these considerations, federal courts hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *United Mine Workers of America v. Gibbs, supra.*

"Ordinarily, the question of power to hear the whole will be resolved on the pleadings. But whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. *United Mine Workers of America v. Gibbs, supra.*

"Appellants' argument in federal court, as well as before this Court, is bottomed upon the alleged 'un-

fairness' of the '50:50' Rule. Whether it be a challenge to the Commission's authority to promulgate such a mandate or allegations concerning an absence of minimum procedural due process guarantees prior to its enactment, Appellants' center of gravity — about which all else turns — remains the reasonableness of the '50:50' Rule.

"While we are quick to note the nebulosity of the term 'common nucleus of operative fact,' any holding negating its presence in the instant case would read the concept right out of existence. Assuming substantial identity of parties, we hold, therefore, that Appellants' state and federal claims are simply alternative grounds of recovery for the same cause of action.

"*Substantial Identity of Parties*

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies. *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Res judicata applies where the parties to both suits are 'substantially identical.' *Wheeler v. First Alabama Bank of Birmingham, supra; Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F. 2d 958, 961 (5th Cir. 1968).

"Judgments can bind persons not party (or privy) to the litigation in question where the nonparties' interests were represented adequately by a party in the original suit. *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84, 94-95 (5th Cir. 1977). A person may be bound by a judgment even though not a party to a suit if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative. *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975). Moreover, if a party has 'a sufficient "laboring oar" in the conduct' of the litigation, then the principle of res judicata can be actuated. *Montana v. U.S.*, 440 U.S. 147, 155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979).

> "Appellants contend, and we agree, that the parties to the federal action and in the cause now before us were not identical. Applying the legal precedent to the facts heretofore set out, however, we find they were 'substantially identical,' that Plaintiffs' rights in this action were adequately represented in the federal litigation, and that identical parties in interest retained central control of the litigation in both forums. *See* Restatement (Second) of Judgments §§ 78, 78.1 and 88 (Tent. Draft Nos. 3 and 4, 1976, 1977).
>
> "In summary, our holding is that (1) both the federal and state claims arose from a common nucleus of operative fact; and (2) the parties to both causes were substantially identical. Therefore, Appellants' action in the circuit court is barred by the doctrine of res judicata. Thus, the trial court's judgment denying the relief sought by the Plaintiffs is affirmed.
>
> "We further express the opinion that the trial court's findings on the merits of the case are compelled by *Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Commission*, 440 U.S. 941, 99 S.Ct. 1415, 59 L.Ed.2d 630 (1979)."

Appellants do not take issue with the fact that the *Battle* Judgment was rendered on the merits by a court of competent jurisdiction. The question remains, however, whether or not the remaining two elements of res judicata are to be found in the present action.

Was there an identity of the parties?

The trial judge found that all the elements of res judicata were present so as to bar appellants' litigation; thus, the trial judge found that there was a "substantial identity" of the parties in both suits. I believe his finding is supported by the evidence. Indeed, it appears that each of the parties to this action was either a party or a privy of some class member in the *Battle* litigation. Appellee Liberty National was a party defendant in both actions, and appellee Aubrey Carr was a member of the class of funeral directors in *Battle*. Mr. and Mrs. Taylor, and hence appellants as well, were members of

the class consisting of "all insureds under outstanding burial and vault policies issued, assumed, or reinsured by Liberty National and all persons with any right, title or interest in or benefit under such policy."

Appellants argue, however, that there is no substantial identity of the parties, because Aubrey Carr, as a member of the class of funeral directors, "occupied the same side" as the policyholder class in the litigation before the federal court.

Notwithstanding appellants' argument, I believe that adversity is not determined simply by the alignment of the parties. As the court observed in *Universal Underwriters Ins. Co. v. Ford Motor Co.*, 264 F.Supp. 757 (E.D. Tenn. 1967):

> "The styling of the parties in the original proceeding does not necessarily determine whether they are adversaries. The test is whether they make each other adversaries by raising issues among themselves. If they do they are bound by the findings of the jury or the Court, whichever is the finder of the facts. The parties are also bound by the conclusions of law with respect to the issues before the Court or such issues as could have been brought before the Court."

Id. at 759; *accord, Diamond Shamrock Corp. v. Lumbermens Mut. Casualty Co.*, 416 F. 2d 707 (7th Cir. 1969). *See City of Mobile v. George*, 253 Ala. 591, 45 So. 778 (1950). Indeed, the Restatement (Second) of Judgments" 38 (1982), sets forth this principle:

> "Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually litigate fully and fairly as adversaries to each other and which are essential to the judgment rendered." (Emphasis added.)

The cases relied upon by appellants, *AAA Equipment & Rental, Inc. v. Bailey*, 384 So. 2d 107 (Ala. 1980), and *St. Paul*

Fire & Marine Ins. Co. v. Dowdell, 40 Ala. App. 141, 109 So. 2d 151 (1959), do not conflict with this rule. In those opinions, res judicata and collateral estoppel did not apply, because the issues and claims were not contested by and between the parties. That the parties were aligned as co-parties was not determinative. As the Court held in *AAA Equipment*: "In this case the parties were not litigants against one another in the first action. As between themselves, they were not contestants." 384 So. 2d at 110.

In *Battle*, however, appellee Carr and the appellants were contestants as to the issue which is the very subject of the present controversy: the funeral director's duties and obligations under the terms of the burial policy, particularly in an oversale situation. The federal district court, ordering changes in all Liberty National burial policies, specifically decreed in paragraph XVII G of its order, with respect to "oversales," that:

> "Where other or additional services or merchandise are provided for the burial of the deceased insured and an 'oversale' is thus made, the funeral director shall be required to allow only the retail value stated in said burial insurance policy in force on the insured as a credit against the charges and expenses if the existence of such insurance is made known to the contract funeral director prior to the burial of the deceased insured or within 30 days thereafter."

I believe there was sufficient evidence to authorize the trial judge here to conclude that the interests of the policyholder class and those of the funeral director class in "oversale" situations, as determined by the federal district court, were adverse; therefore, I would find the third element of res judicata is satisfied.

Was the subject matter of the prior and subsequent actions the same?

I am of the opinion, as was the trial judge, that they were, and res judicata bars the relitigation of all issues which were or could have been litigated in the prior action. *Century 21*

Preferred Properties, Inc. v. Alabama Real Estate Comm'n, supra, 401 So. 2d at 768; *Educators' Investment Corp. v. Autrey, supra*, 383 So. 2d at 538. *Accord, Ray v. Tennessee Valley Authority*, 677 F. 2d 818 (11th Cir. 1982). In its order dismissing the instant case below, the trial court specifically noted:

> "The subject matter of the claims of the representatives of the policyholder class was based on the sale, issue and performance of the burial insurance policies issued or assumed by Liberty National. They sought to recover damages against the defendants for allegedly injuring them in the sale of funerals, funeral services, funeral merchandise and burial insurance relating thereto. The [federal district court] in *Battle* described [representatives of the policyholders] as claiming violations of the antitrust laws and also [stated that representatives of the policyholders] had invoked the pendente lite jurisdiction of the [federal district court] in counts of misrepresentation and fraud with respect to burial insurance policies issued or assumed by Liberty National. Plaintiffs charged Liberty National had engaged in deceptive sales tactics in the marketing of burial insurance policies and they sought compensatory and punitive damages for the fraud and deceit allegedly practiced on them."

Based on these findings of fact by the trial judge, I am of the opinion that he could find that all the issues raised by appellants in the present action were or could have been determined in *Battle*; therefore, the trial judge could find that the subject matter of both actions was the same.

Even though I would uphold the trial court's determination that appellants' action is barred by the doctrine of res judicata, one of the basic reasons I dissent is that appellants are not foreclosed from other avenues of relief. Paragraph XXXIII of the court's decree in *Battle* provides that the federal district court retains jurisdiction over both the subject matter and the parties "for the purpose of enabling any of the parties to this action to apply to [that] court at any time

for further orders and directions as may be necessary . . . ." (Emphasis added.) I am also of the opinion that appellants may also seek relief from the final judgment in *Battle*, in the federal forum, under Rule 60(b), Fed. R. Civ. P. *See e.g., Hallman v. Pennsylvania Life Ins. Co., supra: see also* 2 Newberg on Class Actions § 2755(e) (1977). Even though I would affirm the trial court's judgment, I should not be understood as saying that I would have reached the same result that was reached in the federal class action. The adequacy of the notice is a substantial question. The construction of the burial policy in "oversale" situations raises serious questions, but I am not privy to all the agreements and compromises which were made to terminate that litigation. In any event, as I have already stated, as I read the order rendered in *Battle*, these plaintiffs, if aggrieved, may go to the federal forum and present their arguments to that court, and if unsuccessful in convincing that judge to grant them the relief to which they consider themselves entitled, they could appeal to higher federal courts.

Based on these reasons, I conclude that the trial court correctly refused to take jurisdiction of the claims here presented. Consequently, I must respectfully dissent.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-7700

EDGAR H. BATTLE, d/b/a EDGAR H. BATTLE FUNERAL HOME, ET AL.,

Plaintiffs,

JAMES L. TAYLOR, individually, and as the administrator of the Estates of JAMES JACKSON TAYLOR and LAURA F. TAYLOR, deceased, FRANCES LOUISE TAYLOR SPENCE, DEBRA TAYLOR, DIANE TAYLOR STAFFORD, PHILLIP TAYLOR, GRETTA TAYLOR and ANNIE J. ELROD, individually and as executrix of the estate of DAVID A. ELROD, deceased,

Plaintiffs-Intervenors-Appellants,

versus

LIBERTY NATIONAL LIFE INSURANCE COMPANY; BROWN SERVICE FUNERAL HOMES COMPANY, INC.; SERVICE INSURANCE COMPANY OF ALABAMA, and all others similarly situated,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, Circuit Judge, HILL and ESCHBACH*, Senior Circuit Judges.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Louie Anderson

UNITED STATES CIRCUIT JUDGE